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ABSTRACT

This paper examines student resegregation by race and socioeconomic class, high stakes accountability measures aimed at affecting educators' decisions on student promotion and graduation, and continuing disparities in school resources and finance, all of which intensified in 2002, particularly in North Carolina and the U.S. south. The paper asserts that without careful planning, their simultaneous convergence threatens to derail public education. It discusses the new constraint on race-conscious student assignments suggesting that, absent some contrary Supreme Court decision or extraordinary efforts by southern school boards to circumvent its impact, this ban will recreate levels of racial and socioeconomic isolation not experienced since the 1960s. Section 1, "School Racial Composition: The Legal and Demographic Realities in North Carolina," discusses the Supreme Court's changing rulings, the ban on race-conscious student assignments, the demographic future of North Carolina's public schools without race-conscious assignments, and the adverse educational impact of racial resegregation. Section 2, "School Accountability: Unintended Consequences?" discusses the development of the accountability approach, North Carolina's commitment to accountability, and the likely impact of high stakes testing in resegregating schools. Section 3 examines "School Finance/Resource Inequities: While Major Reforms are Educationally Necessary, Will They Prove Sufficient, and Can Political Will be Sustained?" (SM)

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EDUCATION'S 'PERFECT STORM?' RACIAL RESEGREGATION, 'HIGH STAKES' TESTING, & SCHOOL INEQUITIES: THE CASE OF NORTH CAROLINA

John Charles Boger

Paper submitted for August 30, 2002 Conference
In Chapel Hill, North Carolina on

The Resegregation of Southern Schools? A Crucial Moment In the History (and the Future) of Public Schooling in America

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EDUCATION'S 'PERFECT STORM?' RACIAL RESEGREGATION, 'HIGH STAKES' TESTING, & SCHOOL INEQUITIES: THE CASE OF NORTH CAROLINA

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\EDUCATION'S 'PERFECT STORM?' RESEGREGATION, 'HIGH STAKES' TESTING, & SCHOOL INEQUITIES: THE CASE OF NORTH CAROLINA

In *The Perfect Storm*[1] author Sebastian Junger recounts the last voyage of the *Andrea Gail*, a 72-foot-long "rake-stem, hard-chined western-rig swordfisherman,"[2] whose crew sailed out of Gloucester, Massachusetts in mid September of 1991. After three weeks of grueling but unproductive labor on the Grand Banks off Newfoundland, the *Andrea Gail* pushed its luck by sailing further east, in uncertain autumn waters, toward another fishing ground called the Flemish Cap, some 1200 miles east of New England's coast. There, luck appeared to turn, and by October 25th, the *Andrea Gail* could turn westward toward harbor, its hold stowed with 40,000 pounds of swordfish.

Two days later, while still 750 miles out of homeport, the ship's captain received word of three developing weather systems—a hurricane brewing off Bermuda, a cold front descending from Canada, and a gale soon to develop on the Grand Banks.[3] The captain, who had battled strong storms before, was determined to move his perishable cargo directly to market and proceeded toward Gloucester. His fateful decision steered the *Andrea Gail* into the eye of a once-in-a-century, threefold storm. By October 29th, freak warm winds from the late-season Hurricane Grace converged with the colder Canadian low and the gale to produce, at their juncture, conditions far deadlier than any one storm alone could have summoned—a "meteorological hell" that whipped seas to an unfathomable fury. The hapless vessel and her crew, battling these unnatural forces,

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[1] **Sebastian Junger, The Perfect Storm: A True Story of Men Against the Sea** (Harper Paperbacks ed., 1997).
[2] *Id.* at 35.
[3] *Id.* at 119.

found itself at the mercy of 70- and 80-foot waves. The *Andrea Gail* capsized and went down, all hands lost in this 'perfect storm.'

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Among its lessons, *The Perfect Storm* illustrates that *converging* forces can sometimes overwhelm even seasoned professionals who focus on discrete threats rather than their combined power. This paper will examine three educational developments—(1) student resegregation by race and socioeconomic class; (2) "high-stakes" accountability measures aimed at affecting educators' decisions on student promotion and graduation; (3) continuing disparities in school resources and finance—all of which are presently gathering strength in 2002, especially in North Carolina and the American South. Each alone presents formidable challenges to educational policymakers and administrators. Yet without the most careful foresight and planning, their *simultaneous* convergence threatens to send public schools reeling off course, beyond the effective control of even the most well-meaning and conscientious public servants. They could well become public education's 'perfect storm.'

The first of these rapidly-intensifying forces comes with the imminent end of nearly fifty years of court-ordered school desegregation, a period during which hundreds of judicial and administrative decrees combined to bring racial integration to public schools across the South, transforming it from the most segregated to the most integrated region in the nation.[4] The new era, beyond court-ordered desegregation, promises massive and still uncertain changes in the patterns of student assignment and enrollment that could reshape Southern education for the coming generation.

Although many school districts remain under federal court order in 2002,[5] the present trend toward federal disengagement is clear, impelled by the Rehnquist Supreme Court's insistence that returning "local control" to public school boards is now the chief constitutional imperative.[6] Many Southern school boards, moreover, including those in North Carolina, will find themselves effectively prohibited from using this newly restored "local control" to assure the continuance of racially integrated public schools.

The explanation for this new constraint on race-conscious student assignments lies in two astonishing decisions that take away, with one judicial hand, the very "local control" that the Rehnquist Court has offered with the other. These new decisions, rendered by the United States Court of Appeals for the Fourth Circuit[7]— and likely to be adopted soon within the Fifth and Eleventh Circuits as well[8]— forbid school boards

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[4] Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in* **Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education*** 57-58(Gary Orfield, Susan E. Eaton, et al., eds.1996)

[5] *See generally,* Wendy Parker, *The Future of School Desegregation*, 94 **NW. U. L. Rev.** 1157 (2000) (contending that the effective end of Southern school desegregation is far less imminent than many commentators suggest); *see also* Wendy Parker, *Reconsidering the Role of District Court Judges in School Desegregation*, at 15 (forthcoming in this Symposium) (noting estimates that there remained over 695 pending school desegregation cases in 1995).

[6] *See* Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991) (stressing the need to grant local authorities the freedom "to adopt new school programs to meet local needs"); Freeman v. Pitts, 503 U.S. 467, 489 (1992) (describing as the "end purpose" of desegregation cases "to remedy the violation and, in addition, to restore state and local authorities to the control of a school system"); Missouri v. Jenkins, 515 U.S. 70 (1995) (same). Three decades earlier, a very differently comprised Supreme Court, striving for the elimination of racial discrimination "root and branch," *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), had instructed those Southern school districts formerly practicing *de jure* segregation to "make every effort to achieve the greatest possible degree of actual desegregation" among students. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971).

[7] *See* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (per curiam), *cert. dismissed*, 120 S. Ct. 1552 (2000); Eisenberg v. Montgomery County Sch. Bd., 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

[8] Although neither the Fifth nor the Eleventh Circuits have addressed the permissibility of race-conscious student assignment policies in elementary and secondary schools, both courts have rejected Justice Powell's basic conclusion in *Regents of the Univ. of Cal v.Bakke*, 438 U.S. 265, 311-14 (1977)— that achieving a racially diverse study body in college and graduate schools is a constitutionally permissible practice—and have instead held, albeit for different reasons, that colleges and professional schools may not routinely engage in race-conscious admissions practices. *See Hopwood v Texas*, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (rejecting racial diversity as a sufficiently "compelling governmental interest" to survive Equal Protection Clause scrutiny); *Johnson v. Board of Regents of Univ. of Georgia*,

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directly to consider the races of students as they make school assignment decisions.[9] Well-meaning educators, in short, may not act either to implement a good faith belief all American children in the 21st century need to be educated in multi-racial schools, or even to avoid the patterns of racially segregated student attendance that characterized an earlier era.

I suggest below that, absent some contrary Supreme Court decision or extraordinary efforts by Southern school boards to circumvent its impact, this new ban on race-conscious student assignments will re-create, in many urban and some rural Southern school districts, levels of racial and socioeconomic isolation in school districts not experienced by students in the South since the mid-1960s.

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263 F.3d 1234, 1251-54, 1263-64 (11th Cir. 2001) (concluding that even if racial diversity remains a compelling governmental objective under *Bakke*, a university's use of race-conscious criteria to achieve that end is presumptively unconstitutional, since college admissions decisions may not employ racial criteria absent an "extraordinary justification").

[9] In taking these steps, the Fourth Circuit has, in practice, repudiated Justice Powell's celebrated decision in the *Bakke* case, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978), which determined that a university's objective in attaining a racially and ethnically diverse student body "clearly is a constitutionally permissible goal" that would justify the University of California at Davis Medical School in making race a "plus" factor in admissions decisions. *Id.* at 316-18. Although no other single Justice joined in Justice Powell's opinion, his opinion has shaped admissions practices throughout the nation in subsequent years, since four other justices agreed with Justice Powell that student diversity is a constitutionally permissible end that justifies race-conscious admissions decisions. *Id.* at 361-62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (contending that affirmative action programs with the "benign" end of increasing minority student enrollment in higher education should be reviewed under a more favorable constitutional standard than race-conscious actions taken for "invidious" ends).

The Fourth Circuit purported to rely on two later decisions rendered by the Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989) and Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227-28 (1995), in which it subjected all federal or state governmental decisions employing race-conscious classifications to "strict judicial scrutiny." Under that standard, race-conscious criteria are permissible only if they both (1) further a "compelling governmental end" and (2) are narrowly tailored to avoid unnecessary use of racial criteria. *Croson*, 488 U.S. at 506; *Adarand*, *515* U.S. at 235. In the absence of direct guidance from the Supreme Court in *Croson* or *Adarand* about whether educational diversity is a compelling end, the Fourth Circuit, obviously mindful of the *Bakke* decision, first "assumed, without so holding, that [achieving racial] diversity may be a compelling governmental interest," *Tuttle*, 195 F.3d at 705 (acknowledging Justice Powell's opinion adopting that view in *Bakke*, and noting that only the Fifth Circuit had since disavowed the *Bakke* approach). *See also Eisenberg*, 197 F. 3d at 130 (same). However, although the Fourth Circuit accepting student diversity as a "compelling" goal, it reasoned that the school boards' use of express racial criteria in selecting students for magnet schools—practices employed by the

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The second force now affecting Southern education has arrived with the implementation of new "accountability" systems that have, during the past decade, attained practical domination over the educational planning and delivery systems of every state. Originally proposed in response to concern over lagging test scores by American students and ostensibly poor work skills among high school graduates,[10] these accountability systems borrow many of their essential features from the world of business management.[11] Accountability approaches to educational reform have been especially popular in Southern states such as North and South Carolina, Texas, and Kentucky,[12] and have recently become federal obligations as well for all districts nationwide that accept federal Title I funds.[13]

During the past fifteen years, North Carolina has wholeheartedly embraced an accountability model; its system, known locally as "The ABC's of Education,"[14] has been singled out as among the nation's best.[15] In early 2002 Congress,relying in large part on

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Arlington County School Board and the Montgomery County Board of Education to assure racial balance in the schools—were not sufficiently "narrowly tailored" means to obtain student racial diversity.

[10] *See generally* **High Stakes: Testing for Tracking, Promotion, and Graduation** (Jay P. Heubert & Robert M. Hauser, eds. 1999).

[11] **The Educational Reform Movement of the 1980s: Perspectives and Cases** 19 (Joseph Murphy, ed., 1990) (citing several sources in support of this conclusion).

[12] Lynn Olson, *Finding the Right Mix*, *in* **Quality Counts 2001: A Better Balance: Standards, Tests, and the Schools to Succeed** 14 (**Educ. Week**, Jan. 11, 2001)

[13] *See* Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, (1965) *codified as* 20 U.S.C. §§ 236-41 (1976), *now appearing as* Title I of the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1427 et seq., 20 U.S.C. §§ 6301-6578. Under the terms of the reauthorized Title I adopted in January of 2002, all states "desiring to receive a grant under this [Title]" which is by far the largest source of federal funds available to support elementary and secondary education, "shall submit to the Secretary [of Education] a plan" that includes accountability goals, annual testing measures, annual "state report cards," and positive and negative incentives for teachers, administrators, and students. *See* 20 U.S.C. § 6311.

[14] The North Carolina Department of Public Instruction has an extensive self-description of the history, purposes, and results of the ABC's program. *See* http://www.ncpublicschools.org/abc (visited Aug. 19, 2002); *see also* **David Grissmer & Ann Flanagan, Exploring Rapid Achievement Gains in North Carolina and Texas** 19-25 (National Education Goals Panel, Nov. 1998) (describing essential features of the ABC's system).

[15] *See* **The Princeton Review, Testing the Testers 2002: An Annual Ranking of State Accountability Systems** 1(2002) (rating North Carolina's accountability program as the best in the nation).

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the apparent success of accountability experiments such as those underway in Texas, Kentucky, North Carolina and other states, has radically restructured the federal Title I program—first enacted in 1965 to provide federal funds to low-performing children in poorer schools and school districts[16]—by imposing sweeping new accountability procedures on every state that receives federal Title I monies (as every state currently does).[17] This "federalization" of the accountability approach marks a major departure for Congress; never before has the federal government intruded so centrally into the yearly curriculum and the daily organization of the public schools. The No Child Left Behind Act ensures that accountability systems will everywhere become mainstays of public educational organization and practice in the decade to come.

Yet neither the educational assumptions of the accountability approach nor its empirical consequences have received as much long-term study or validation as its rapid political acceptance might suggest. This paper will not address the full and complex implications of these profound educational changes, but will, instead, consider only the their likely impact on the future of Southern schools that are undergoing the termination

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[16] Title I of the Elementary & Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat.27, 27-36 (1965), *codified as* 20 **U.S.C.** § 236-41 (1976). A useful bibliography, citing studies of Title I's enactment, its first fifteen years of implementation, its modifications, and its evaluations through 1980 can be found in Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Second Education*, 52 **Harv. Educ. Rev.** 384, 396 n.43 (1981).

[17] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1444. (2002). *See id.*, § 1111, 20 U.S.C. § 6311 (setting forth requirements that every complying State (1) adopt a "single statewide State accountability system that will be effective (2) in ensuring the all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph," (3) that they "include sanctions and rewards, such as bonuses and recognition, . . . to hold local educational agencies and public elementary schools and secondary schools accountable for students achievement," (4) that they develop a twelve-year "timeline for adequate yearly progress," (5) that they implement "a set of high-quality, yearly students academic assessments that include at a minimum, academic assessments in mathematics, ready or language arts, and science," (6) that these statewide tests be imposed on all students in at least three grades between the third and twelfth grades, and (7) that states develop annual report cards to announce their progress, school by school, toward their goals, (8) specifically disaggregating their data so as to report on the collective performance of students by race, by ethnicity, by gender, and by status as economically disadvantaged).

of court-supervised desegregation. Although the new federal approach requires states to pay careful attention to their various student sub-populations, and specifically to report annually the achievement of students on statewide accountability tests in "disaggregated" form (by the "race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged" of all students in various schools and districts[18]) I draw a pessimistic conclusion. In my judgment these reporting measures will not—without extraordinary, heroic intervention by state or local legislatures and school boards—suffice to prompt states to redress longstanding patterns of underachievement by poor and minority children. Instead, I fear school accountability and racial resegregation will interact, albeit inadvertently, to accelerate the division of Southern districts into discrete "winner" and "loser" schools increasingly identifiable not merely by the relative successes or failures of their test-takers but by the races and socioeconomic status of their students.[19]

The third force currently affecting Southern education is the perennial tumult over educational resources, a winner/loser struggle most often permitting wide disparities between the financially favored districts and schools—where facilities are modern, teachers well-qualified, and special academic programs abundant—and those less

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[18] *Id.* at 115 Stat 1457, 20 U.S.C. § 6311 (h)(1)(C)(i).

[19] My forecast is certainly not inevitable. Accountability approaches have the potential to drive resources to students, schools, and school districts that need them most. Test scores, in other words, might conceivably serve educationally diagnostic purposes, and such ameliorative uses are what the principled supporters of the accountability movement doubtless intend. Some contributors to this conference suggest that once accountability test results are regularly disaggregated by students' races, socioeconomic status, limited-English proficiency status, and/or special education status, they will serve as the most promising vehicle ever to address the long-neglected needs of minority or other educationally subordinated children. *See* James S. Liebman and Charles Sabel; *see also* William L. Taylor.

Maybe. The powerful historical forces that have maintained racial segregation and subordination in public and private life for over 400 years, as well as the market forces that affect parental residential choices and, hence, their school choices—suggest a more malign possibility, once that Roslyn Mickelson has detected at work in the Charlotte-Mecklenburg system in the mid- to late-1990s.

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fortunate districts—where shortages of educational materials such as library books, computers, or laboratory equipment are perhaps less educationally damaging than persistent shortages of qualified teachers, smaller classes, or specialized courses and programs for high-achieving or low-performing students.

Prior to 1954, of course, these struggles over resources took an explicitly racial cast in the South, since all-white legislatures and school officials deliberately starved African American schools of the financial and human resources afforded their white counterparts.[20] In more recent decades, however, the struggles have pitted the economically more prosperous and "property rich" regions of each state against less prosperous, "property poor" regions or school districts.[21] In the same thirty years during which desegregation attorneys and their allies actively pursued school desegregation, other reformers launched separate initiatives under the flag of school finance reform, urging state courts and legislatures to modify longstanding educational finance policies that permitted great fiscal disparities to prevail among school districts. These battles, moreover, were often prompted not merely by abstract demands for "fiscal neutrality," or

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[20] *See generally* **James D. Anderson, The Education of Blacks in the South, 1860-1935** (1988) (contending that the separate and inferior provision of education to African American children manifest the Southern ideology of racial domination and subordination); **Robert A. Margo, Race and Schooling in the South, 1880-1950: An Economic History** 33 (1990) (describing "an initial period of relative similarity [in per pupil expenditures for black and white school children] in the later nineteenth century, followed by a pronounced shift towards inequality around the turn of the [twentieth] century that persisted for forty years, and then a trend toward equalization in the 1940s"); **Gunnar Myrdal, 2 An American Dilemma: The Negro Problem & Modern Democracy** 879-907 (Pantheon Books 1962) (1944) (describing the underfunded "Negro School" in the American South of the 1930s and 1940s).

[21] *See generally* **John E. Coons, William H. Clune III, & Stephen D. Sugarman, Private Wealth & Public Education** (1970) (laying out the classic economic and educational critique of state school finance systems that rely heavily upon local property taxation, which inevitably favors "property rich" districts); **Arthur E. Wise, Rich Schools Poor Schools: The Promise of Equal Educational Opportunity** (1967)(arguing that school resource disparities deny equal educational opportunity). San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (deciding, by a 5-to-4 vote, that the federal Equal Protection Clause does not authorize the federal judiciary to "strictly scrutinize" state school finance statutes, even those that permit wide fiscal disparities among school districts).

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"fiscal equity," but by the realization that schools and districts with the fewest resources were often those serving higher percentages of poor children and racial and ethnic minorities.[22] Since 1970, several successive waves of school finance reform lawsuits, many in Southern States, have invoked state constitutional principles of educational equality or "adequacy" to obtain judicial reordering of legislative outcomes that reformers have challenged as inequitable and unjust.[23]

Some believe, in fact, that recent judicial or legislative decisions to redirect more educational resources to needy schools and students might prove a crucial educational counterforce, one sufficiently powerful to neutralize any adverse effects flowing from racial resegregation. If poor or predominantly minority schools only have sufficient resources, so this argument runs, they do not need the dubious benefits of racial integration.

Like many states, North Carolina has witnessed a vigorous constitutional attack on its school finance policies. In a 1997 decision, *Leandro v. State*,[24] the North Carolina Supreme Court declared that the state's constitution promises every child "the

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[22] *See generally* James E. Ryan, *Essay:* Sheff, *Segregation, and School Finance Litigation*, 74 **N.Y.U.L. Rev.** 529 (1999) (describing the parallel tracks pursued by school desegregation and school finance litigators, often without full appreciation of the relationship between the two reform movements).

[23] Although the Supreme Court of the United States has determined that federal constitutional principles are essentially irrelevant to this struggle, *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declaring, after a 5-to-4 vote, that the Equal Protection Clause does not authorize the federal judiciary to "strictly scrutinize" even those state statutes that operate to permit wide fiscal disparities among school districts), many state courts have decided that their state constitutions *do* constrain legislative allocation of funds to local school districts. For a review of recent legal struggles to implement school finance reform, see Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* **Law & School Reform: Six Strategies for Promoting Educational Equity** 88-159 (Jay P. Heubert ed. 1999); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 **Mich. L. Rev.** 432 (1999) (reviewing the history of modern school finance litigation, and suggesting that racial considerations may still drive judicial and legislative resolutions in many of these cases).

[24] 346 N.C. 336, 488 S.E.2d 249 (1997).

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opportunity for a sound basic education."[25]" *Leandro* has been remanded to a specially designated trial judge, charged to give concrete meaning both to the general right of North Carolina students and the duties of State educational officials. That judge, in turn, has rendered a remarkable series of rulings in four lengthy opinions which appear to require the State to address the unmet educational needs of every at-risk child.[26] In his final memorandum decision, the judge ordered that "every classroom be staffed with a competent, certified, well-trained teacher who is . . . implementing effective educational methods that provide differentiated, individualized instruction, assessment, and remediation to the students in that classroom," and that "every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met."[27]

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[25] *Id.* at 351, 488 S.E.2d at 254. Although the Court emphasized the State's corresponding duty to provide this sound basic education to each child, it clarified that the State was not required to offer "substantially equal funding or educational advantages in all school districts. *Id.* at 349, 488 S.E.2d at 256. North Carolina's state court has thus joined the camp that moving toward an "adequacy" approach that focuses on school "outputs," such as student achievement, rather than the older "equity" approach, that emphasized the equalization of school "inputs" such as funding or resources. [cite articles clarifying this distinction]

[26] The Superior Court found, among other things: (1) that thousands of North Carolina children are not receiving a sound basic education; (2) that their sub-proficient performances on state accountability tests are an appropriate measure of that failure; (3) that thos most at risk of academic failure tend to come from lower income families, from racial and ethnic minority backgrounds, from single parent or homeless families, or from other social conditions of greater risk; (4) that these at-risk children have the inherent capacity to succeed in school; (5) that, under the North Carolina constitution, their early-life disadvantages can and must be off-set by state-funded educational services, including pre-kindergarten programs; (6) that they require additional help, programs, and resources from public schools to meet their educational needs; and (7) that the first educational priority of the State of North Carolina must be to assure "a sound basic education" for these and other children. Memorandum of Decision , *Hoke County Bd. Of Educ. v. North Carolina* at 142 (Wake Co. Super. Ct., Oct. 12, 2000); Memorandum of Decision , *Hoke County Bd. Of Educ. v. North Carolina* (Wake Co. Super. Ct., Oct. 26, 2000); Memorandum of Decision , *Hoke County Bd. Of Educ. v. North Carolina* (Wake Co. Super. Ct., Mar. 26, 2001); Memorandum Decision at 110, *Hoke County Bd. Of Educ. v. North Carolina* (Wake Co. Super. Ct., April 4, 2002).

[27] April 4, 2002 Decision, *supra* note XXX, at 109-10.

If fully implemented, such an order could require not only " an "educational needs assessment" for every child in every school throughout North Carolina, but sufficient changes in educational practices and in resource enhancements to bring all children to a proficient level of performance. The trial court has announced that it will exercise continuing jurisdiction to oversee the full implementation of its sweeping remedial orders.[28] Yet the State has appealed these lower court decisions, and the future of *Leandro* is presently uncertain.[29] In his response to the *Leandro* mandate, North Carolina's Attorney General is following a path well-trodden path by executive officials and legislatures in other states, who have resisted judicially mandated redistribution of educational resources.

Indeed, in many states where the judiciary has proceeded most boldly to direct school finance reform, serious political resistance has emerged to limit the effectiveness of judicial initiatives.[30] If there exist inherent limits on the practical ability of state and

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[28] *Id.* at 112.

[29] The Superior Court rebuked North Carolina educational officials in two sharply worded letters following the State's filing of a 90-day report on July 5, 2002, in which the State outlined its purported progress in implementing a remedial decree. In the first letter, the Court observed that "the materials submitted by the State of North Carolina to the Court, while commendable in their content and aspirations for the school children of North Carolina, *do not show any effort* by the State to take remedial actions as Ordered and thus do not satisfy the reporting requirements set forth by the Court." Letter from the Honorable Howard E. Manning, Jr. to Thomas J. Ziko, Special Deputy Attorney General in *Hoke Cty. Bd. of Educ. v. State of North Carolina* 9-10 (July 19, 2002)(emphasis in original). After further response from Deputy Attorney Ziko, the Court issued a second letter, addressed not only to counsel but to North Carolina's Superintendent of Public Instruction and the Chair of its State Board of Education, concluding that "the State of North Carolina, acting through its Department of Public Instruction and the Board of Education and the Office of the Attorney General, have unilaterally elected to provide 'lip service' only and, as clearly reflected in the [State's two letters], hunker down and hope that the Court will choose to do nothing while the State continues to 'do nothing.' This is a decision which the Court will, utilizing restraint and due deference, afford you until August 26, 2002, to seriously reconsider." Letter from the Honorable Howard E. Manning Jr. to Michael E. Ward, et al. 17-18 (August 15, 2002).

[30] *See generally,* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 **Mich. L. Rev.** 432, 471, 476 (1999) (marshalling evidence that in many states, such as New Jersey, Texas, and Arizona, "the legislature and/or the public has openly and often fiercely opposed devoting more resources to districts attended primarily by minority students," and concluding that "one cannot fully understand the dynamics and limitations of school finance reform without paying attention to the dynamics of race relations in general and school desegregation in particular.")

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federal courts to command effective racial desegregation of school districts, as many observers contend,[31] there may likewise be practical limits on the power of courts to compel legislative majorities to drive dollars disproportionately toward poor and minority school children.[32] Moreover, even if *Leandro*'s expansive orders are fully implemented, educational researchers are divided over whether additional resources alone can suffice, over the long term, to overcome the structural challenges presented by high concentrations of low-income children in "high poverty" schools.[33] We will examine both the pedagogical and the political constraints on school finance reform, especially with an eye to the demographic changes—in both racial and socioeconomic composition—likely to accompany the end of desegregation and the acceleration of the school accountability system.

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[31] *See generally*, **David J. Armor, Forced Justice: School Desegregation and the Law** 174-88, 210 (1995) (suggesting that both mandatory and voluntary desegregation plans in metropolitan areas lead to "white flight" from metropolitan schools to surrounding suburban districts); **Christine H. Rossell, The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing** 187-88 (1990) (arguing that magnet schools, by bringing students together through their parents' voluntary choices, lead to more desegregation than do mandatory assignment plans, which prompt white flight) **James S. Coleman, Sara D. Kelley, & John A. Moore, Trends in School Integration** (1975) (same).

[32] *See* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 **Harv. L. Rev.** 1072, 1078-85 (1991) (noting strong institutional reluctance of state courts to intrude upon the legislature's taxation and appropriations powers, the "disproportionate influence of property-rich districts in state legislatures," the "collective action problems arising from voter unwillingness to pay for the higher taxes associated with school finance remedies" and the average middle class suburbanite's "undervaluation of the collective benefit" to be derived from adequately educating urban and minority youth); Christopher P. Lu, Note, *Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform*, 28 **Harv. J.L.** 543, 552-53 (1991) (arguing that both suburban self-interest and class bias work against voluntary legislative action for effective school finance reform); *see also* William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez: *Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 **Conn. L. Rev.** 721, 752 (1992) (noting the necessity for judicial action "to overcome . . . legislative resistance against substantial amoungt of compensatory aid"); Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 **Duke L.J.** 1099, 1128-36 (discussing the various forms of "backlash" litigation and legislative resistance to school finance reform);**Arthur E. Wise, Rich Schools Poor Schools: The Promise of Equal Educational Opportunity** 198 (1967) (calling it "unrealistic to expect state legislators to vote for programs which do not yield direct benefits to their own constituents" and noting the "rough sledding" that school finance reforms have traditionally had in state legislatures).

[33] *See* discussion at XXX *infra*.

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I.

School Racial Composition: The Legal and Demographic Realities in North Carolina

A. The Supreme Court's Changing Constitutional Commands

Until 1954, laws in North Carolina and every Southern state required rigid segregation of both public school students and faculty along racial lines. For over a decade after the Supreme Court's seminal decision in *Brown v. Board of Education*,[34] North Carolina's state and local political leadership parried the thrust of *Brown* with a variety of policies all deliberately crafted to delay racial integration of schools. The "North Carolina way" employed legal and administrative devices more subtle than the open defiance that marked the post-*Brown* responses of the Deep South, but the results were no less successful.[35] As late as 1964, only a handful of North Carolina's African American students were attending desegregated schools.[36]

During the 1950s and 1960s, national civil rights organizations joined with the handful of African American lawyers then practicing civil rights law in the South[37] to launch scores of desegregation lawsuits,[38] including over three dozen in North Carolina

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[34] 347 U.S. 483 (1954).

[35] *See, e.g.*, **William Chafe, Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom** 48-60(1981) (recounting Governor Luther Hodges' support for the Pupil Assignment Act of 1955 and the "Pearsall Plan" that together centralized student assignments at the state level and created a rabbit warren of administrative barriers to frustrate African Americans who requested reassignment to all-white public schools).

[36] *See* **Gary Orfield, The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act** (1969).

[37] *See generally*, **Jack Greenberg, Crusaders in the Courts** 38-41 (1994) (recalling that "[a]s late as 1965, Mississippi had only three black lawyers in civil rights," while Maryland had at most, five or six in the 1950s, North Carolina, only three [at least, before the Chambers, Stein firm opened its offices in Charlotte in 1964], South Carolina, only one; Georgia, one; Alabama, four; and Florida three or four)

[38] *Id.*, 2254-55 (noting that by the end of the 1950s, the NAACP Legal Defense & Educational Fund, Inc. had brought more than sixty elementary and high school desegregation cases, but that as of June of 1960, not a single African American child was attending school with whites in the five Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, and fewer than 200 each in other Southern states including Arkansas, Florida, North Carolina, Tennessee, and Virginia).

alone.[39] Most languished inconclusively until after 1968, when the Supreme Court in *Green v. County School Board* first declared that formerly segregated school systems could not purge their dual systems simply by adopting "freedom of choice" plans that placed both the initiative and the social burdens of desegregation on black school children and their parents. Instead, *Green* required school boards themselves to fashion "unitary, nonracial system[s] of public education," paying particular attention to desegregate of six areas of school life: (1) student attendance; (2) faculty assignments; (3) staff assignments; (4) student transportation; (5) extra-curricular activities; and (6) school plant and physical facilities .

The most decisive *remedial* victory of the entire post-*Brown* era came three years later, in a North Carolina case, *Swann v. Charlotte-Mecklenburg Board of Education*,[40] in which a unanimous Supreme Court authorized an array of race-conscious methods to desegregate Charlotte's county-wide school district. The Court authorized (1) black/white ratios as "starting points" when making student assignments to Charlotte's schools, (2) pairing predominantly black, central city neighborhoods in Charlotte with white suburban neighborhoods to create racially integrated (though geographically non-contiguous) school zones, and (3) the use of extensive cross-town busing to transport these students for desegregative purposes.[41]

In the wake of *Green* in 1968 and *Swann* in 1971, both the United States Department of Health, Education, and Welfare and federal judges throughout the South acted to demand similar plans. In consequence, the percentage of African American and

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[39] *See generally*, **Frye Gaillard, The Dream Long Deferred** (1988) (recounting the role of the Chambers, Stein firm in the Charlotte desegregation case)
[40] 402 U.S. 1 (1971).
[41] *Id.* at 23-30.

white children in the South attending majority-white schools soared— from 2.3% in 1964 to 33.1% in 1970, to 37.6% in 1976, and to 43.5% by 1988—affording the South by far the most racially integrated schools in the nation.[42] While many skirmishes and some serious legal challenges followed,[43] and while thousands of white parents withdrew their children from the public schools in some Southern cities and Deep South school districts,[44] the years between 1972 and 1992 nonetheless witnessed a pattern of broad compliance with federal judicial decrees. The progress toward fully integrated schooling proved so substantial that few plaintiffs were prompted to revisit federal courthouses after 1980 for revision or enforcement of still-outstanding court decrees. Indeed, when Reagan Administration's lawyers contacted many Southern school boards in the late 1980s, offering the full assistance of the Department of Justice in ending federal judicial supervision, they were surprised at how very few accepted the offer.[45]

Two factors explain why North Carolina schools, and those of the South more generally, moved past school districts in non-Southern states during this era to become the least segregated in the nation. The first depends upon a crucial point of constitutional law: federal courts are authorized by the Equal Protection Clause to require broad desegregative steps only after finding that a school board has engaged in intentional

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[42] *See* **Gary Orfield and John T. Yun, Resegregation in American Schools** tbl. 8, *Changes in Black Segregation in the South, 1954-1996: Percentage of Black Students in Majority-White Schools* (June 1999). http://www.law.harvard.edu/groups/civilrights/publications/resegregation99/resegregation99.html. measure segregation by

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[45] *See***Gaillard, The Dream Long Deferred**, *supra* note XXX, at xv (recalling how President Ronald Reagan, running for reelection in 1984, seriously miscalculated local sentiment in Charlotte on a campaign trip, receiving stony silence from an otherwise enthusiastic Charlotte crowd when he asserted, mid-speech, that "'busing . . . takes innocent children out of the neighborhood school and makes them pawns in a social experiment that nobody want,. And we've found out that it failed'").

segregative actions.[46] Since the statutes and state constitutional provisions in Southern states *required* segregation before 1954, the burden to demonstrate intent to segregate by race was easily satisfied. By contrast, very few non-Southern states or localities operated under statutes that expressly required racial segregation. Thus, uncovering indirect proof of school board intent was normally far more difficult, even when clear patterns of *de facto* segregation emerged in local schools.[47]

The second explanation for the South's more thorough desegregation during the 1970s and 1980s is geographical and governmental. Historically, Southern states organized their public school into large geographical districts, often fully coextensive with county or metropolitan lines. By contrast, most school districts in Northeastern or North Central states are small and highly fragmented; a metropolitan region like Philadelphia or Detroit might contain between fifty and one hundred small school districts, each relatively homogeneous and stratified by socioeconomic status and race. When the Supreme Court in 1974, in *Milliken v. Bradley*,[48] decided that federal courts could not constitutionally order *inter-district* school desegregation remedies except in unusual circumstances, it effectively foreclosed the racial desegregation of many metropolitan areas outside the South.[49]

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[46] *See* Keyes v. School District No. 1, Denver, Colo. 413 U.S. 189, 198,, 208 (1973) (observing that "in the case of a school system. . . where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action").

[47] *See* Dayton Bd. of Educ. v. Brinkman I, 433 U.S. 406, 412-18 (1977) (vacating a judgment that imposed a systemwide desegregation remedy on Dayton schools, in the absence of proof of discriminatory intent, even though the great majority of Dayton schools were racially imbalanced) ; *see also Keyes*, 413 at 219-20 (Justice Powell, concurring in part and dissenting in part) (contending unsuccessfully, with support only from Justice Douglas, that the Court should abandon its constitutional "distinction between *de jure* and *de facto* segregation" in school cases).

[48] 418 U.S. 217 (1974).

[49] *See* Gary Orfield, *Turning Back to Segregation*, *in* **Dismantling Desegregation**, *supra* note XXX, at 10-12; *accord*, James E. Ryan, *Schools, Race, and Money* 109 **Yale L. J.** 249, 261(1999). Professor Liebman

Although Southern schools remained substantially integrated by race throughout the 1980s, the unraveling of this educational pattern began in the 1990s, prompted, in part, by new judicial rulings issuing from the Rehnquist Supreme Court. In a succession of sharply divided opinions issued in 1991, 1992, and 1995, Chief Justice Rehnquist invested "local control" of schooling with a constitutional weight that purportedly sufficed to counterbalance the Warren Court's concern with racial discrimination and educational injury. In so doing, the Court responded not only to its own hierarchy of values, but to a new class of litigants. These new plaintiffs were not the avowed Southern segregationists of the 1950s and 1960s--the Orval Faubuses of Arkansas or George Wallaces of Alabama—but affluent migrants to the South's growing suburbs and small towns. They had not participated in the desegregation battles of the 1960s and 1970s, and they saw in the cross-neighborhood school assignments a relic of a distant past, injurious to their children's present educational interests, and an implicit breach of their paid-for neighborhood entitlements.[50]

B. Charlotte-Mecklenburg: The Supreme Court's New Approach Plays Out

The Charlotte-Mecklenburg school district, the chief battleground of the *Swann* era, illustrates the transformation wrought by this new approach. In 1992, prompted by the district's suburban parents and its business interests, Charlotte's new school superintendent (although still under court order and acting without federal court approval), persuaded the school board to abandon the mandatory cross-town busing at the

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has shown, however, that desegregation orders continued to be issued in many other non-Southern school districts throughout the 1980s, including Buffalo, Indianapolis, Kansas City, Milwaukee, St. Louis, Yonkers, and the suburbs of Pittsburgh. James S. Liebman, *Desegregation Politics : 'All-Out' School Desegregation Explained*, 90 **Colum. L. Rev.** 1463, 1468-69 (1990) (citing cases).

heart of Charlotte's 20-year desegregation order. In its place, he installed a regime of school assignments built around newly designated "magnet schools," each with some special educational theme, in which parents from across the school district could voluntarily elect to place their children.[51] This did not seem, at first, to undermine Charlotte-Mecklenburg's hard-won racial integration, since the school board required these new magnet schools to retain a rough racial balance reflecting the demography of the Charlotte school system as a whole.

Yet when some suburban white parents found that their children were unable to attend the magnet schools of their choice because of the school board's continuing commitment to racial balance, they filed federal lawsuits in 1997, asserting that the school board' "race-conscious" assignments violated the Equal Protection Clause.[52] The Charlotte school board defended its continuing commitment to racial balance in its schools as a necessary part of its compliance with the *Swann* decree. The white parents responded that the Charlotte school district had long since met any outstanding constitutional obligations to desegregate, and that the district should forthwith be declared "unitary," released from further federal obligations, and forbidden to take any further race-conscious school assignments.[53]

At this point, attorneys for the original African American plaintiffs in *Swann* reentered the scene, insisting that as Charlotte had *not* eliminated all vestiges of its

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[50] Roslyn Arlin Michelson & Carol A. Ray, *Fear of Falling From Grace: The Middle Class, Downward Mobility, and School Desegregation*, 10 **Res. in Soc. of Educ.& Socialization** 207 (1994)

[51] For a general history of these developments see Roslyn Mickelson, Carol Ray, and Stephen Smith, *The Growth Machine and the Politics of Urban Educational Reform: The Case of Charlotte, North Carolina, in* **Education in Urban Areas: Cross-National Dimensions** 169 (Nelly P. Stromquist ed., 1994); *see also* Alison Morantz, *Desegregation at Risk: Threat and Reaffirmation in Charlotte, in* **Dismantling Desegregation**, *supra* note XXX, at 179-206 (recounting Charlotte's change in the 1990s to a magnet school approach).

[52] Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp.2d 228, 239 (W.D.N.C. 1999).

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former racially dual system, any decree of "unitary status" would therefore be premature, and that further race-conscious assignments were not merely permissible under the Equal Protection Clause, but constitutionally obligatory.[54]

A lengthy hearing ensued. The black plaintiffs produced evidence demonstrating that in the 1990s, after a long period of substantial integration between 1974 and 1992 under the mandatory assignment system, Charlotte attendance patterns lurched sharply toward racial resegregation under the post-1992 magnet school plan. Moreover, they contended, this change was not the result of any overall demographic shift in the Charlotte school-aged population. While Charlotte's population grew substantially after 1970, the percentage of African Americans remained relatively stable, moving upward only from 24% to 27%. Moreover, while the total school population increased from 84,000 students in 1969 to 98,542 students in 1998-99, the black student population also remained quite stable after 1980, rising only from 40% in 1980 to 42% in 1998.[55]

Despite this overall continuity in Charlotte's residential and school populations, the number of Charlotte schools that became "racially identifiable" as black during the 1990s (that is, where student populations exceeded by more than 15% the percentage of blacks in the overall student population of the district)[56] grew by 50% system-wide and by nearly 200% at the high school level, while the number of schools with student bodies that were over 90% white increased from none (during the nearly two decades after

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[53] *Id.* at 239-40.
[54] *Id.* at 239.
[55] Petition for Certiorari at 8-9 n.2, Belk v. Capacchione, *cert. denied*, ., __U.S.__, 122 S.Ct. 1538 (U.S. 2002) (No. 01-1122),.

[56] *Capacchione*, 57 F. Supp.2d at 245-46 (noting some uncertainty about the precise measure of impermissible racial identifiability employed that the federal court in the *Swann* case in the past, and adopting a measure that would allow variations in the racial population of any one school so long as those

1974), to eight (after the 1992 assignment plan changes). By 1998, nearly 30 % of all African American students in the Charlotte system were attending racially identifiable schools.[57]

The white suburban plaintiffs did not seriously contest these figures, but insisted that the changing school populations were the product of Charlotte's changing residential demographics. The federal district court agreed, noting that "Charlotte has experienced an outward growth of its population from the inner city into the peripheral areas of the county," and that "[d]uring this suburbanization trend, the inner city and nearby suburbs lost large numbers of white residents," so that "[t]oday, blacks are still more concentrated near the inner city, and whites have become highly concentrated in the outer peripheries."[58] The district court also observed that a significant percentage of white students in Charlotte had left the public system for private or home schools, which accounted for 14.2 percent of Charlotte's overall student enrollment by 1998.[59]

The court acknowledged that Charlotte schools had drifted toward greater racial segregation during the 1990s, and that most of these increases followed the 1992 change to a magnet school model. Yet it reasoned that this shift in assignment policies was justifiable in light of the lengthy bus rides some children had endured under the mandatory system; it also deferred to the board's judgment that "[t]he implementation of magnet schools [would] help[] to restore and maintain racial balance in schools that were rapidly becoming imbalanced" because of the changing residential demographics.[60] The

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variations do not exceed, by more than fifteen percentage points in either direction, the overall racial composition figures for the district as a whole).

[57] Petition for Certiorari, *Belk, supra*, at 9-10.

[58] Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 228, 237 (W.D.N.C. 1999), *aff'd sub nom.* Belk v. Capacchione, 274 F.3d 814 (4th Cir. 2001)(en banc).

[59] *Id.*

[60] *Id.* at 249.

court reasoned that the emerging 90% white schools were located in "the northernmost and southernmost regions of the county where the census tracts are virtually all-white" and that the school board had no constitutional obligation "to fix growing imbalances that were attributable not to the prior *de jure* system but to independent demographic forces and private choice."[61]

This crucial issues lies on a fault line of contemporary school desegregation law. The earlier jurisprudence of *Green* imposed upon school boards an "affirmative duty to take whatever steps might be necessary" to eliminate racial discrimination "root and branch," so that the resulting system would be "without a 'white' school and a 'Negro' school, but just schools."[62] In *Swann*, the Court developed a legal presumption (rebuttable by the school board but controlling in the absence of contrary evidence), that

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[61] *Id.* at 254-55. The Supreme Court 1971 decision in *Swann* had been very attentive to the possibility of abuse in such circumstances, noting that

> [p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on the composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. . . [S]chool authorities have sometimes, . . . buil[t] new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further locak the school system into the mold o separation of the races.

402 U.S. at 20-21. Although the Charlotte-Mecklenburg's white student population declined by 15,000 students between 1970 and 1990, before experiencing moderate increases, while its black student population increased by over 15,000. *Capacchione*, 57 F. Supp.2d at 238, the Charlotte school board placed 25 of the 27 new schools built after 1980 in white residential areas. Petition for Certiorari, *Belk* at 20. The district court dismissed the constitutional significance of these facts by noting that "[w]ith the exception of some of the newest schools in the southernmost and northernmost areas of the county, these [new] schools have been able to accommodate racially balanced student populations" *Id.* at 252-53.

[62] 391 U.S. at 442.

any racially imbalanced schools in a desegregating district were the products of continuing, impermissible discrimination.[63]

Twenty years later, the Court's 1992 decision in *Freeman v. Pitts* clarified that the continuing obligation of desegregating school districts to make adjustments to maintain racial balance depends on resolution of a factual issue—whether those current racial imbalances were a "vestige of the dual system, rather than a product of independent demographic forces."[64] The Court then fashioned two rules that, in effect, lightened the evidentiary burden on school districts. First, it suggested that plaintiffs bore the burden to demonstrate a causal relationship between the board's prior segregative policies and the current racial disparities in student enrollment. Second, it directed reviewing courts to assume that any causal relationship diminishes to legal insignificance over time, absent proof of continuing misconduct by the school board.[65]

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[63] 402 U.S. at 26. The *Swann* court did acknowledge, however, that

> [i]t does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the* system. By 1992, Justice Scalia was insisting that any such presumption would inevitably work, in practice, to prevent an end to a school board's affirmative duty. *See*, Freeman v. Pitts, 503 U.S. at 505 (Scalia, J., dissenting) (noting that in formerly segregated jurisdictions, *Swann* and later cases had established "a presumption, effectively irrebuttable (because the school district cannot prove the negative) that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed").

[64] 503 U.S. at 477.

[65] "Where resegregation is a product, not of state action, but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure*.

> In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist. But thought we cannot escape our history, neither must we overstate its

The district court's decision declaring that the Charlotte system had become unitary by 1999—despite sharp increases in the racial segregation of Charlotte's elementary and secondary schools during that decade—flowed directly from the Supreme Court's subtle but crucial shifting of the burden of proof from formerly segregated school districts—on which *Green* and *Swann* had clearly placed it—to those minority plaintiffs who continue to urge school boards to adjust pupil assignments to counter racial changes within their district.

C. The New Judicial Ban on Race-Conscious Student Assignments: Lower Federal Courts Write Their Own New Chapter

As part of its 1999 decision in the Charlotte case, the district court forbade the Charlotte school board, once unitary, from continuing to consider race in making student assignments to public schools, whether through race-based lotteries, preferences or set-asides.[66] In so doing, it anticipated by a month the constitutional rule set forth in the two Fourth Circuit decisions decided later in 1999, *Tuttle* and *Eisenberg*, that currently govern every school district in West Virginia, Maryland, Virginia, North Carolina, and South Carolina. I have elsewhere argued that these cases are fundamentally wrong, that

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> consequences in fixing legal responsibilities. The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.
>
> As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.

Id. at 495.

[66] *Capacchione*, 57 F. Supp. 2d at 291-92.

they misread both the Equal Protection Clause and the Supreme Court precedents on which the Fourth Circuit purports to rely.[67] Nonetheless, the Fourth Circuit's decisions currently bind all lower federal courts within its jurisdiction, and as indicated above, they may well command assent from the other two major federal appellate circuits with jurisdiction over Southern schools, the Fifth Circuit and the Eleventh Circuit, once the issue is squarely presented.

It is thus crucial to ask what student assignment practices remain available to school boards that might desire to retain racially integrated schools. The decisions in *Tuttle* and *Eisenberg* offer no clear answer.[68] *Tuttle* referred to several "alternative race-neutral" student assignment policies that, if employed by the Arlington County School Board, might have passed constitutional muster.[69] Yet both of those plans depend for their successful operation upon the clear assumption that Arlington's various neighborhoods are already highly racially segregated. Indeed, such plans would achieve racial diversity in public schools by relying on the known racial differences of different neighborhoods as a proxy for students' races.[70] This seems problematic, since any school

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[67] John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 **N.C. L. Rev.** 1719 (2000).

[68] *Id.* at 1785-89.

[69] One plan would allow a school board to designate "a small geographic area . . . as the home school for the [school attendance zone] and fill the remaining spaces . . . by means of an unweighted random lottery." The home school geographic area, the plan noted, "would presumably be selected so that its residents would positively effect the diversity of the school." Presumably, the home zone would be an area with a predominantly minority residential population, so that the inclusion of some home zone students, plus others chosen from throughout the school district by random lottery, would assure a racially mixed student population. Another plan cited with approval by the *Tuttle* court would allot to "[e]ach neighborhood school . . . a certain number of slots [for students who might want to transfer to] at each alternative school." *Tuttle*, 195 F.3d at 706 n.11.

[70] It is possible that the Fourth Circuit might decide that such plans are somewhat more narrowly tailored than a direct selection of students by race. Since neighborhoods cannot limit residential entry to members of one race or ethnicity, of course, Buchanan v. Worley, 245 U.S. 60 (1917); *see also* Shelley v. Kramer, 334 U.S. 1 (1948), parents of whatever race who want to give the advantage of particular student assignments that appear to flow to children from one neighborhood would be legally free to move there (if economically able to do so).

board reliance on proxy measures of student racial identify brings its own constitutional problems. The Supreme Court has long forbidden state actors to adopt ostensibly race-neutral criteria with the underlying intent to draw racial distinctions,[71] and lawsuits in several other jurisdictions have directly challenged such practices by school boards as unconstitutional.[72]

If the use of neighborhoods as racial proxies eventually is held to be constitutionally impermissible, what other student assignment options might remain for school boards interested in assuring student diversity? The Wake County, North Carolina school board has recently chosen to rely upon two other demographic factors: (1) "[d]iversity in student achievement (no more than 25% of the students assigned to any school will be performing below grade level on state tests, when averaged across a two-year period);" and (2) "[d]iversity in socioeconomic status (no more than 40% of the students assigned to any school will be eligible for free or reduced price lunch)[73]

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[71] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 241 (1976) (holding that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race"). *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 420 U.S. 252 (1977) (applying *Davis*). Indeed, parents in other states are currently challenging the general authority of school boards to consider race when drawing student assignment zones.

[72] *See, e.g.*, Boston's Children First v. City of Boston, 98 F. Supp. 2d 111, 112-14 (D. Mass 2000) (denying school board's motion to dismiss a lawsuit alleging that the Boston School Committee's designation of school attendance zones, drawn in part on consideration of the racial demography of Boston's residential neighborhoods, violates both the Fourteenth Amendment as well as federal and state statutes); Comfort v. Lynn School Committee, 100 F. Supp. 2d 57 (D. Mass. 2000)(denying the plaintiffs' motion for a preliminary injunction in a similar lawsuit).

[73] *See* **Wake County Public School System, Student Assignment § 6200 D, E** available at http://www.wcpss.net/policy_files/policy_pdfs/6000_series.pdf (visited June 30, 2002); *see also* Elizabeth Jean Bower, Note, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 **N.C.L. Rev.** 2026 (2000); Boger, *supra* note XXX, at 1726 n.18 and 1792. For a general discussion of the value of using class-based measures in creating student bodies, *see* **Richard Kahlenberg, All Together Now: Creating Middle-Class Schools Through Public School Choice** (2001).

Wake County's twin emphasis on the socioeconomic composition and the academic performance does not appear to raise any significant Equal Protection Clause issues, since neither socioeconomic status nor academic performance are normally subjected to "strict scrutiny" by the federal courts. The Wake County School Board, if challenged, must show only that these criteria are "reasonably related" to "legitimate" state ends. That far lower burden of proof should be easily met, since educational researchers

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Since the average socioeconomic condition of African American and Latino families in Wake County and elsewhere in the South and nation is lower than that of average white Anglo families,[74] and since their children perform less well on statewide tests,[75] Wake County's student assignment criteria have the incidental effect of creating a substantial degree of racial and ethnic desegregation, as well.[76]

The real wrinkle in the Wake County approach, however, is not constitutional; it is political. Some parents in Wake County have already begun to object to any assignment of children from lower income neighborhoods to their children's schools. In March of 2000, two white PTA co-presidents attempted to organize resistance to a proposed transfer of sixty-eight poor and low-performing children, all but one African

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have long noted that both the socioeconomic composition and the academic composition of schools can affect the academic performance of children who attend them—with clear evidence that strong performances become more unlikely in "high poverty" schools or in schools with high percentages of low-performing students. **James S. Coleman et al., Equality of Economic Opportunity** 299-302 (1966) (demonstrating a strong empirical relationship between the socioeconomic status of a school's student population and individual academic performances); **Christopher Jencks, Inequality: A Reassessment of the Effect of Family and School in America** (1972) (same).

[74] *See* **Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2001,** at 40, tbl. 37 *Demographic and Economic Profiles of Selected Racial and Hispanic Origin Populations* (122 ed.) (reporting national figures that in 1999, only 7.3% of white families were below the poverty line, compared with 21.9% of black families and 20.2% of Hispanic families).

[75] *See* **North Carolina Justice & Community Dev. Center, Exposing the Gap: Why Minority Students Are Being Left Behind in North Carolina's Educational System** 26 (Raleigh, NC, Jan. 2000) (reporting that in 1999, 3-8th grade reading scores in Wake County schools on state end-of-grade tests were, on average, 30.9 points lower for African-American students than whites, and 30.8 points lower on mathematics). The overall statewide gaps separating African American and white students in North Carolina in 1999 were 25.5 on reading and 24.4 points on mathematics. *Id.* at 24. *See also*, **The North Carolina Comm'n on Raising Achievement and Closing Gaps, First Report to the State Bd. of Educ.** (Dec. 2001) (the "Bridges Report") The Bridges Report disclosed that in 2001, the average composite scores achieved on statewide tests among all of North Carolina's 3-8th grade students, disaggregated by race and ethnicity were: 82.0 for whites, 78.6 for Asians, 60.0 for Native Americans, 58.7 for Hispanics, and 52.0 for blacks. *Id.* at 26, exh. 2. *See generally*, **The Black-White Test Score Gap** (Christopher Jencks & Meredith Philips eds., 1998) (analyzing the origins of, historical extent of, explanations for, and policies that might overcome, the racial achievement-score gap).

[76] If Wake County or another school board adopted such a plan program *because of* those racial effects, of course, it would subject itself to a *Tuttle* challenge, since the intent of the state actor is decisive in assessing whether the Equal Protection Clause has been violated. Yet a school board's recognition that its use of socioeconomic and/or academic criteria would have a disproportionate racial effect, on the other hand, would *not* suffice, standing alone, to establish any constitutional violation. *See, e.g.*, Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

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American, to their local school. One co-president defended her position, insisting, "I'm not a racist . . . I'm trying to protect my neighborhood school."[77] Although that particular incident ended without turmoil, even greater opposition arose the following year when the school board reassigned some white, middle-income families away from their neighborhood schools to provide socioeconomic and academic balance in lower-performing and lower-income schools.[78] Although Wake County has not abandoned its plan, public controversy has led the board to acquiesce in something less than full compliance; by mid-year of 2001-2002, the overall student composition in fourteen of Wake County's public schools fell outside of its demographic guidelines.[79]

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[77] *See* T. Keung Hui, *School plan draws foes*, **News & Observer**, Apr. 7, 2000, at B1; T. Keung Hui, *Turned out, turned away*, **News & Observer**, May 6, 2000, at A1 (describing the transferee children, most of whom lived in single-parent, African American families with working mothers).

[78] In the fall of 2001, the Wake County administrators attempted to broaden their initial practice of relying on moves involving mostly low-income students to achieve diversity goals. When they sought to reassign middle and upper-income students, their decision drew sharp opposition from PTA leaders, who objected that reassigning middle-class children away from their schools would take away active parent volunteers. *See* T. Keung Hui, *PTAs say too many children shifted*, **News and Observer**, Nov. 29, 2001, at A1.

Another center of parental opposition developed with the administrative proposal to shift students from two overcrowded, suburban elementary schools to two under-enrolled schools with higher low-income populations. *See* Todd Silberman, *School moves spark resistance*, **News and Observer**, Feb. 20, 2002, at A1. During the conflict, two powerful parent groups formed, committed not only to stopping their children's reassignments but to the broader goal of changing Wake's entire school assignment policy. *See* T. Keung Hui, *Anti-busing parents solidify force*, **News and Observer**, March 30, 2002, at B1. The school board ultimately rejected one proposal to shift students, noting that "political and logistical hurdles," including pressure brought by parents demanding the maintenance of small, homogenous schools. *See* Todd Silberman, *Wake schools remain unbalanced*, **News and Observer**, March 24, 2002, at B1. Parents at another school, however, failed in their attempt to block their children's reassignments. *See* Hui, *Anti-Busing*, *supra*.

In January of 2002, Wake administrators dropped reassignment orders for almost 1400 students after receiving complaints from parents. *See* T. Keung Hui, *School re-assignments explained*, **News and Observer**, Jan. 10, 2002, at B1.

[79] T. Keung Hui, *Anti-Busing*, *supra* note XXX, at B1

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D. The Demographic Future of Public Schools in the Absence of Race-Conscious Student Assignments

If federal constitutional principles no longer permit those North Carolina school boards freed from federal judicial supervision to engage in race-conscious student assignments, what are the likely consequences for the composition of those public schools in the coming decade? The answer would appear to depend principally upon two factors: (1) the extent of residential segregation in North Carolina's 117 school districts; and (2) the precise design of the student assignment plans implemented in each of North Carolina 117 school districts. Obviously, *residential* segregation will prove especially significant in determining *school* resegregation if districts choose student assignment strategies based on assignments to neighborhood schools. Yet even if districts rely on assignment plans that afford greater parental choice, residential segregation will play an important residual role (since most such plans leave neighborhood schools as the automatic assignment absent a choice by parents), and it is thus important to begin by assessing the level of residential segregation in the South generally, and North Carolina more particularly.

1. The Latest Evidence on *Residential* Segregation: Moderate Declines

Data drawn from the 2000 census, indicate that residential segregation among African Americans is decreasing; indeed, significant declines have occurred since 1970, both during the decade between 1980 and 1990, and again between 1990 and 2000. At present, overall residential segregation is at its lowest level since the 1920s.[80] Moreover,

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[80] Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation in the 2000 Census: Promising News* 3 (The Brookings Institution, Survey Series, April, 2001) (all of Glaeser & Vigdor's statistics in this paper present

the South has experienced the greatest overall decline of *any* region (measured on two accepted indexes, and trails only the West on three other key indexes).[81] One study that examined the fifty metropolitan regions with the largest African American populations in 2000, noted that although segregation remained high in ten "mainly Rustbelt metro areas" of the Northeast and Midwest, "[a]t the other extreme, . . . segregation has now fallen into what social scientists consider the moderate range . . . [in] several mid-sized metropolitan regions in the South: Charleston, Greenville, Norfolk, Raleigh-Durham and Augusta."[82]

All of these trends are reflected in North Carolina . While two North Carolina metro areas, Hickory-Morganton-Lenoir and Jacksonville, are among a handful of metropolitan areas (only 19 of 291) where black/non-black segregation *increased* during the decade between 1990 and 2000, residential segregation actually declined by over twelve percentage points in Wilmington, North Carolina, by between five and ten percentage points each in Greensboro-Winston Salem-High Point, and Raleigh Durham, and by five percentage points or fewer in Asheville, Charlotte-Gastonia-Rock Hill, and Fayetteville.

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black/nonblack comparisons); John Iceland, Daniel H. Weinberg, & Erika Steinmetz, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, 8 & tbl. 1 (Paper presented at the annual meetings of the Population Ass'n of America, Atlanta, Ga., May 9-111, 2002); The Lewis Mumford Center, *Ethnic Diversity Grows, Neighborhood Integration Lags Behind* 1 (April 3, 2001, as revised, December 18, 2001).

[81] Iceland, Weinberg & Steinmetz, *supra* note XXX at 8. Iceland and his colleagues measured segregation using the familiar dissimilarity index, an isolation index (the converse of the more familiar exposure index), a delta index (a concentration measure calculating the proportion of a group's population that would have to move across neighborhood boundaries to achieve a uniform density across a metropolitan area), an absolute centralization index (examining the distribution of a minority group around a metropolitan center) and a spatial proximity index (measuring the extent to which minority neighborhoods are clustered). *Id.* at 5-6. The South had the lowest measured residential discrimination under the delta/concentration index and the absolute centralization index. *Id.* at tbl. 1.

[82] The Lewis Mumford Center, *supra* note XXX, at 4. However, three larger Southern cities, Memphis, Birmingham, New Orleans, are among the ten metropolitan areas nationally where blacks are most isolated from whites. *Id.* at 7; Table *Black-White Segregation in Top 50 Metro Areas.*,

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Despite this good news about downward *trends*, because residential segregation has historically been extremely high, overall *levels* of residential segregation remain very high for African Americans in most metropolitan areas. Seventy-four American metropolitan areas, approximately one quarter of the total, remain "hypersegregated" in 2000 under conventional demographic measures, while 160 remain "partially segregated" and only 83 "less segregated."[83] Moreover, the declines in segregation result largely from the relocation of small numbers of African Americans to formerly all-white or overwhelmingly white neighborhoods, rather than from moves by substantial numbers of whites into African American neighborhoods, or alternatively, movements by substantial numbers of blacks into white areas.[84]

Indeed, in 2000 the average white resident lives in a metropolitan area that is overwhelmingly white: 80.2 percent of his/her neighbors are white while only 6.7 percent are black, 7.90 percent Hispanic, and 3.9%, Asian. Suburban figures show every more dramatic disparities: the average suburban white neighborhood in 2000 is only 5.3% black (a figure up only slightly, from 3.5%, since 1980).[85]

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[83] Glaeser & Vigdor, *supra* note XXX, at 4. Glaeser and Vigdor employ the "dissimilarity" index for this measure. Their use of the dissimilarity index measures the proportion of the black population that would be required to move from its current census tract for blacks to be evenly distributed among all census tracts throughout a metropolitan region. The index ranges from 1.0 (indicating that every black resident would need to move) to 0.0 (indicating that no moves would be necessary). A metropolitan area with an index score of 0.6 or above is deemed "hypersegregated." "Partial segregation" refers to dissimilarity scores from 0.4 to 0.6, and "less segregated," to scores below 0.4. *Id.* at 2-4. Glaeser & Vigdor note that "[t]he large number of American metropolitan areas with extremely high levels of segregation [in 2000] remains striking." *Id.* at 4. Moreover, the overall *national* dissimilarity index has fallen only from 0.695 in 1990 to 0.652 in 2000, still in the hypersegregation range. *Id.* at 5.

[84] Glaeser & Vigdor, *supra* note XXX, at 5. Whereas in 1960, all-white metropolitan census tracts were the norm—indeed, 17.2 percent of all metropolitan census tracts in 1960 had zero black residents, and nearly two-thirds, or 61.8 percent, had fewer than one percent black residents—by 2000, only one-quarter of all metro census tracts, or 23.1 percent, remain true white enclaves. *Id.*

[85] The Lewis Mumford Center, *supra* note XXX, at 3 & 31 (unnumbered table entitled *Segregation and Isolation Averages Show Persistence in Cities and Suburbs*). Measured another way, over half of all African Americans who live in metropolitan areas in the year 2000 (50.6%) still reside in census tracts that are 75% black or greater, down only a fraction from the 53.9% who lived in such hypersegregation in 1980.

Turning to Hispanic and Asian populations, overall levels of residential segregation are lower, since these groups "are considerably less segregated than African Americans," by most measures.[86] Yet the trends since 1980 among Hispanics and Asians have been mixed: looking at differences among various cities, "increases in segregation for Hispanics are more common than decreases" in 2000. Indeed, as the number of Hispanic residents increases in a metropolitan region, so does the tendency toward increased residential segregation and isolation.[87] As one report observed, "the metro areas with the largest Hispanic populations are also the most highly segregated."[88] North Carolina has no metropolitan areas in which Hispanics are highly segregated.

Asian-white segregation, finally, "is in the moderate range, and it has remained virtually unchanged since 1980." Only eight of the forty most segregated metropolitan areas for Asians in 2000 are in the South, and six of those eight in either Texas or Florida. None are in North Carolina.[89]

By contrast, fewer than one in every ten resides in a census tract with a "low" level of segregation (below 0.55). *Id.* at 11-12.

[86] *Id.* at 1. Employing the dissimilarity index, in 2000 the overall white dissimilarity with blacks measured 59.9, while white dissimilarity with Hispanics measured only 45.1 and dissimilarity with Asians, 38.9. *Id.* at 31(unnumbered table entitled *Segregation and Isolation Averages Show Persistence in Cities and Suburbs*).

[87] Iceland & Weinberg, *supra* note XXX, at 10-11 & tbl.3 *Residential Segregation Indexes for Hispanics or Latinos by Characteristics of Selected Metropolitan Areas: 1980-2000.* The Lewis Mumford Center, *supra* note XXX, at 16 (unnumbered table entitled *Hispanic-White Segregation in Top 50 Metro Areas*).

[88] The Lewis Mumford Center, *supra* note XXX, at 13. Since Hispanic populations in most Southern metro areas, apart from Texas and Florida, are still relatively small, the 2000 Census figures actually reflect a slight decline in the overall level of residential segregation in Southern metro areas (down from 0.479 in 1980 to 0.461 in 2000. The fifty most segregated metropolitan areas for Hispanics in 2000, measured by the dissimilarity index, include ten from Texas and five from Florida. Ranging in descending order from Houston's dissimilarity index of 0.56, the highest of any Southern metro area, the Southern cities include Houston, Dallas, Atlanta, San Antonio, Fort Worth-Arlington, Brownsville-Harlingen-San Benito, Austin-San Marcos, Corpus Christi, El Paso, Tampa-St. Petersburg-Clearwater, McAllen-Edinburg Mission (TX), Miami, West Palm Beach-Boca Raton, Orlando, Ft. Lauderdale, and Laredo (number 50 on the overall list, with a 0.29 index).

[89] *Id.* at 25 (unnumbered table entitled *Asian-White Segregation in Top 40 Metro Areas).* The Southern cities among the top 40 in 2000 are Houston, Atlanta, Dallas, Ft. Worth-Arlington, Austin-San Marcos,

2. The Latest Evidence on *School* Segregation: Substantial Increases

Since levels of residential segregation are declining, one might expect that levels of *school* segregation would be likewise trending downward in North Carolina and elsewhere the South. The strongly contrary findings by contributors to this conference and other researchers[90] therefore deserve the most careful attention. Professors Clotfelter, Ladd, and Vigdor have examined school segregation in North Carolina at the metropolitan, district, school, and classroom levels. Their multi-phased analysis begins by dividing North Carolina schools into eleven plausible sub-categories: (1) the five largest of North Carolina's 117 school districts, which together account for 28% of the state's public school students; (2) other urban districts, grouped according to North Carolina's three principal geographical regions (mountains, Piedmont, Coastal Plain); and (3) rural districts, again grouped into three geographic regions.[91]

Their first principal observation is that, although in 2000-01, "public schools in North Carolina were, on average, not highly segregated in comparison to other districts in the U.S,"[92] a comparison with figures from 1994-95 "shows a widespread trend toward increasing segregation in the state."[93] Three of the five largest school districts, Charlotte-Mecklenburg, Guilford, and Winston-Salem/Forsyth—the "rapidly resegregating" districts—have experienced dramatic rises in between-school segregation during those

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Orlando, Tampa-St. Petersburg-Clearwater, and Norfolk-Virginia-Beach-Newport News, with dissimilarity rates ranging from a high of 0.49 for Houston to a low of 0.34 for the Norfolk area. *Id.*

[90] *See* Tim Simmons & Susan Ebbs, *Separate and unequal, again*, **News & Observer** February 18, 19, 20 25, 2001; **Charles L. Thompson & Sam D. O'Quinn, III, Eliminating the Black-White Achievement Gap: A Summary of Research** 14 (The North Carolina Education Research Council, June, 2001) (noting that "North Carolina now has 220 schools with minority enrollments of 80% or more — double the number of school schools in 1993).

[91] Charles T. Clotfelter, Helen F. Ladd, & Jacob L. Vigdor, *Segregation and Resegregation in North Carolina's Public School Classrooms* 5-6 (June, 2002).

[92] *Id.* at 8 ; *see also id.*, tbl. 2, entitled *Segregation in School Districts in North Carolina, 1994/95 and 2000/01, Using Two Measures Based on School-Level Data.*

six years, reflecting that black and Hispanic children are disproportionately being assigned to certain schools within the district. Forsyth's "segregation index" has more than tripled (from .07 to .25), while Charlotte-Mecklenburg's segregation index has increased by 66% (from .12 to .20), and Guilford, already high in 1994, rose still higher (from .24 to .29).

By contrast, two other large school districts—Wake and Cumberland—experienced far smaller increases. Wake's segregation index rose from .06 to .09 and Cumberland, from .11 to .13.[94] Among the other categories of North Carolina schools none exhibited either overall levels of segregation or changes between 1994 and 2001 that approached those of the three "rapidly resegregating" districts.[95]

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[93] *Id.*

[94] The authors explain that their "segregation index" "measures the degree to which the actual distribution of students diverges from a racially balanced distribution," on a scale from 1.0, representing total segregation, to 0.0, representing maximum integration. her *Id.* at 6.

[95] *Id.* For example, segregation in the "other urban" district category for the Coastal Plain increased from .11 to .14, while segregation in the Piedmont and Mountain urban districts barely increased at all. Piedmont urban districts, indeed, remained steady at .11 in both years measured, while the Mountain urban districts rose only from .07 to .08. In rural school districts, segregation in both the Piedmont and Mountain regions closely parallels that in the "other urban" districts (moving up from .11 to .12, and .from 06 to .08 respectively) while in the rural Coastal Plain, school districts have even lower levels of segregation (.06 to .07) than do urban coastal districts.

Of course, these between-school measures tend to understate students' actual, in-class experience of racial segregation. Some of the more innovative and interesting portions of the Clotfelter, Ladd & Vigdor report move inside North Carolina schools, to learn the degree of classroom segregation experienced by children assigned to the same school building. They report substantial within-school segregation, with greater levels of classroom-school segregation found among districts that also have higher levels of between-school segregation. *Id.* at 12-13. Moreover, while classroom segregation within schools is very slight in the earlier grades in North Carolina schools, it increases sharply in some schools by grades 7 and 10. *Id.* at 14.

Clotfelter, Ladd, & Vigdor provide strong empirical support for the pervasiveness of the practices observed in the Charlotte-Mecklenburg schools by Professor Mickelson. *See* Roslyn Arllin Mickelson, *Subverting* Swann: *First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 **Am. Educ. Research J.** 215, 232 & tbl. 2 (2001) (reporting high levels of racial imbalance in Charlotte-Mecklenburg's twelfth grade English, biology, and United States history classes, with black students overrepresented in "regular" or "exceptional children" tracks, and markedly underrepresented in "advanced placement" tracks). *See also* William Darity, Jr., Domini Castellino, & Karolyn Tyson, *Increasing Opportunity to Learn via Access to Rigorous Courses and Programs: One Strategy for Closing the Achievement Gap for At-Risk and Ethnic Minority Students* (report to the N.C. State Bd. of Educ., May,

The data for Hispanic/white segregation in North Carolina schools follows the same general pattern, with two important exceptions. While Hispanic/white segregation is less than black/white segregation in the 1st and 4th grades, yet since 1994 it has increased "markedly" among 7th and 10th graders, "becoming by 2000/01 more pronounced than black/white segregation." Moreover, the rate of the increase in North Carolina's school segregation of Hispanics over the 1994-2001 period was greater than for any other racial group.[96]

Clotfelter, Ladd & Vigdor compared the levels of residential segregation to the levels of school segregation and found, as we have already suggested, that

> [f]irst, the relationship between neighborhood and school segregation is surprisingly weak. . . [M]any counties with similar levels of segregation across neighborhoods have extremely different levels of segregation between and within schools. Second . . the average exposure of white to nonwhites at school exceeds

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2001) (exploring the incidence of African American, Native American, and Hispanic students in more challenging courses in North Carolina public schools and finding a substantial "enrollment gap").

A final possibility that Clotfelter, Ladd, & Vigdor explore is that inter-district residential segregation in North Carolina may be operating to direct racial groups to different school districts within a single metropolitan area. Although Clotfelter had earlier demonstrated that these inter-district disparities explain a substantial portion of the overall metropolitan area school segregation in many Northeastern and Midwestern cities. Charles T. Clotfelter, *Public School Segregation in Metropolitan Areas*, 75 **Land Economics** 487, 502 (1999) ("confirm[ing] the prevailing opinion that, not only are metropolitan areas very segregated, [but that] most of that segregation is due to racial disparities between districts rather than segregative patterns *within* districts). They found much less inter-district segregation in North Carolina, in large part because many of the state's metro areas comprise only a single school district. Yet there *is* some evidence of inter-district racial segregation in those metro areas that contain more than one school district, especially in three metro areas—Asheville, Greensboro-Winston Salem-High Point, and Charlotte-Gastonia-Rock Hill, *see id.* at 20 & tbl. 5 *Segregation in North Carolina Metropolitan Areas, 1994/95 and 2000/01*, that we have previously identified as "rapidly resegregating" districts. .

This overall pattern, moving from between-school segregation to within-school segregation is consistent with Douglas Massey's observation that, while the mechanisms may vary (interdistrict, intradistrict, intraschool sorting), most American communities continue to find some means by which to segregate black from white children. Douglas S. Massey & Zoltan L. Hajnal, *The Changing Geographic Structure of Black-White Segregation in the United States*, 76 **Soc. Sci. Q.** 527, 538-39 (1995).

[96] *Id.* at 15. The levels of Hispanic-white segregation between 1994 and 2001 increased from 0.16 to 0.25 among seventh graders and from 0.17 to 0.34 among tenth graders. The comparable increases in levels of black/white segregation during that period are from 0.18 to 0.24 among seventh graders, and from 0.20 to 0.23 among tenth graders. *Id.* at 37 tbl. 3.

> the exposure at and around their own homes. Although North Carolina public schools are segregated, in the sense that schools and classrooms are not racially balanced, they nevertheless offer a more integrated experience than do the state's neighborhoods.[97]

This rapid resegregation, in theory, could be a product of an increasing overall proportion of African American and/or Hispanic students in these rapidly resegregating districts. Yet enrollment figures do not support that hypothesis: for example, while Charlotte's black/Hispanic/nonwhite students comprise 53% of the total student population, Guilford's, 48.6%, and Forsyth's, 46.8%, by contrast, Cumberland' black/Hispanic/other nonwhite student population s is higher than any of the rapidly resegregating districts: 57.0% of the total student population (although Wake's is much lower, 36.5%).[98]

3. The Crucial Determinant of School Resegregation: School Assignment Policies

Neither the levels of residential segregation in North Carolina's neighborhoods alone nor the levels of between-district segregation can explain the very large differences that emerge between the three "rapidly resegregating" districts we have identified—Charlotte, Winston-Salem/Forsyth, and Greensboro—and much lower levels of school resegregation within two districts of comparable size—Wake and Cumberland. The explanation must therefore lie elsewhere, most likely in the differences among the student assignment policies employed by the various districts.

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[97] Clotfelter, Ladd, & Vigdor, *supra* note XXX, at 20.
[98] Clotfelter, Ladd, & Vigdor, Appendix A, Table A1, *Enrollment, Racial Composition, Growth Rate, and Segregation by district.*

The myriad issues raised by school board selection of school assignment strategies lie beyond the scope of this paper.[99] Our more limited concern will be with the apparent effect of three basic alternatives on the racial and socioeconomic composition of schools in North Carolina, specifically: (1) the neighborhood school policy, currently pursued in such districts as Greensboro; (2) the controlled choice approach, adopted by Charlotte in the early 1990s and currently being pursued in Winston-Salem/Forsyth district as well; and (3) Wake's unique reliance on student achievement and school socioeconomic composition.

The data from Clotfelter, Ladd & Vigdor's recent study—showing the greatest increases in racial segregation have occurred in Charlotte, Greensboro and Winston-Salem/Forsyth—confirm prior observations that assignment plans based on neighborhood schooling, such as those in Greensboro,[100] and those based on "controlled choice " by

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[99] For a general discussion of these issues as they bear on racial desegregation, examining twenty different school assignment plans from districts throughout the nation, see **Brian L. Fife, Desegregation in American Schools: Comparative Intervention Strategies** (1992). *See also* **Dismantling Desegregation**, *supra* note XXX, at 115-290 (1996) (describing student assignment policies in Norfolk, Va., Detroit, Charlotte, Montgomery County, Md., Kansas City, Mo., and Prince George's County, Md.)

[100] The Guilford County school district, which includes the cities of Greensboro and High Point, experienced widespread racial desegregation of its schools only in 1971. At that time, the school board, under pressure of a pending federal lawsuit, "redrew attendance zones throughout the city [of Greensboro] to create enrollment close to 70 percent white and 30 percent minority at each public school. The former High Point school district used a similar approach the same year. The former Guilford County district, which included the county's suburban and rural districts, had integrated its schools a year before." John Newsom, *Dismantling Desegregation: As Busing Fades, Local Schools Are Becoming More Segregated*, **News & Record** (Greensboro, NC), Aug. 19, 2001, at A1. The plan relied on assignment of many children outside of their neighborhoods of residence, creating over 35 satellite attendance zones.

The Guilford school board in 1998 adopted a redistricting plan that "reassign[ed] about 20,000 students to schools closer to their homes. . . . After three years of implementation, the plan has erased all or part of 24 satellite attendance zones, where students attend schools miles from their homes to promote racial balance. The remaining 11 zones will disappear within three years." *Id.*

According to a local **News & Record** poll, while 70 percent of Guilford respondents said "racially diverse schools were at least somewhat important . . . 59 percent of those polled said they would give up a diverse school for one closer to home." *Id.* Some African American leaders in the community have turned their attention away from desegregation and toward assurance of "a fair share of educational resources" for minority schools, and the Guilford school board has acted to redirect some of its resources even as it has abandoned racial integration as a goal. "Since 1996, Guilford County Schools has spent $8.2 million on

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parents, such as those in Charlotte and Winston-Salem/Forsyth, do not work successfully to avoid racial and socioeconomic resegregation.[101] The first conclusion is unsurprising, in light of the extent of residential segregation in the South in general, and North Carolina and Guilford County in particular. The second is more troubling, since many school boards will feel pressure to offer parents more choice in their children's schooling in order to retain their continued loyalty to the public schools. Those who have studied the political dynamics of the Charlotte system, as noted above, suggest that the dramatic shift from a mandatory student assignment system in 1992 to a magnet school/choice approach reflected just such a calculation about how best to retain the support of middle-class white parents and the business community.[102] Unfortunately, as the Charlotte experience demonstrates, controlled choice plans tend to retain white students only at the price of accelerated resegregation. A recent look at changes by race in student enrollment in Johnston County, situated just east of Raleigh and Wake County, has found a very similar trend toward resegregation under a choice system.[103]

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teachers and programs at schools with high concentrations of low-income, minority children. It was the state's first such equity-funding program. The Board of Education carved $4 million out of this year's budget for schools in minority neighborhoods," and has promised to build four of the districts next six new schools in minority areas." *Id*.

[101] *See, e.g.*, Gary Orfield,

[102] Mickelson, *supra* note XXX, at 218 (contending that Charlotte's 1992 shift "occurred largely because of pressure both from business elites, who complained that the desegregation plan hindered economic development, and from newly relocating middle-class White parents who were dissatisfied with the race and class integration of the schools they found once they arrived in Mecklenburg County"); *see also* Roslyn Mickelson & Stephen S. Smith, *Fear of Falling From Grace: The Middle Class, Downward Mobility, and School Desegregation*, 10 **Res. In Soc. Of Educ. and Socialization** 207 (1994); *see also* Mickelson, Ray, & Smith, *The Growth Machine*, *supra* note XXX, at 175-76.

[103] Adrienne Lu, *Choices lead to shades of segregation*, **News & Observer**, Oct. 26, 2001, at A1 (contrasting, for example, changes in Selma Elementary School's nonwhite enrollment, under a parental choice plan, from 47% in 1995 to 76% in 2001, while five other Johnston County elementary schools have white enrollments in 2001 over 80%). The school superintendent in Johnston County suggested that the situation warranted study and acknowledged that race played some part in parents' decisions to transfer their children: "I don't doubt that that's some of it. How much, I don't know." *Id.* at 18A. At Selma Elementary, 87 white parents whose children were assigned there in 2001, comprising nearly one-third of

In the future, moreover, parental pressures for choice among schools will no longer limited to the public system. The Supreme Court's June 27, 2002 decision in *Zelman v. Simmons-Harris*,[104] upholding the constitutionality of Ohio's decision to provide school vouchers to the parents of low-income children in Cleveland public schools--available to purchase private or parochial school educations with public funds--opens new avenues for parents unhappy with their children's current options in public education.[105] For parents with sufficient means, private schooling, such as that examined by Professor Clotfelter in North Carolina, provides yet other options.[106]

School assignment plans will have less inter-school racial impact, of course, in North Carolina 33 school districts that in 2001-02 assign all students to a single, district-wide high school.[107] Moreover, in 20 of these 33 small districts, there is presently only one middle school as well, precluding choice plans for students attending these middle school.[108] Yet these 33 districts, while comprising over 28% of all North Carolina 117 districts, contain only 8% percent of the State's K-12th grade students.[109] The majority of North Carolina schools, and the vast majority of its students do present schooling

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all white students, obtained transfers to other schools. The retiring principal, commented: "'A lot of the white parents have chosen to move their children out of the schools because of the number of minority students. . . I know that. I call it white flight.'" *Id.* at A1.

[104] __ U.S. __, 70 **U.S.L.W.** 4638 (U.S., June 27, 2002) (Nos. 00-1751, 00-1777, 00-1779).

[105] The *Zelman* decision, of course, only eliminates constitutional objections to vouchers under the Establishment Clause of the First Amendment. The political task of voucher supporters, to obtain widespread legislative authorization of this approach, lies ahead. Because of the threat vouchers appear to pose to the fiscal and educational integrity of public schools, vouchers have powerful political opposition, and the future political struggles should be fierce in most jurisdictions.

[106] *See generally*, Charles T. Clotfelter, *The Role of Private Schools in Southern School Segregation. See also* **Sean F. Reardon & John T. Yun, Private School Racial Enrollments and Segregation** (2002) (finding higher levels of black/white segregation in private schools than public schools nationwide, with especially high rates of segregation in Roman Catholic schools and in private schools in the South and West).

[107] http://www.ncreportcards.org (listing and reporting on every high school, middle school, and elementary school in each of North Carolina's 117 districts).

[108] *Id.*

options that can potentially facilitate racial and class resegregation under some school assignment plans.

E. The Adverse *Educational* Impact of Racial Resegregation on Public School Students: Concentration Effects and High Poverty Schools

One policy response to this trend toward racial resegregation might well be acquiescence. Policy makers and school board members might reason that parents will choose more segregated settings only if they conclude that integration's educational and social benefits to their children simply are not as important as other values. Under this view, the future of school integration should be left to voluntary association, as neighborhoods become more integrated or parents of different races choose the same public schools.[110]

There are three primary responses to this 'free market' approach. The first is that public schooling is more than a consumer good provided for the benefit of students and their parents. Society itself has deep and legitimate interests in social re-production, the intellectual, moral, and social development of the present youth who must become society's leaders in all fields of endeavor. Weighty philosophical and constitutional considerations justify taking this societal interest seriously when making decisions about

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[109] During the 2000-01 academic year, North Carolina enrolled 1, 273, 338 students in grades K-12. **North Carolina Public Schools Statistical Profile**, 2001, at 6.14 -16. Among these, 102, 983 students or 8.09%, attended school in the in 33 school districts with only one high school. *Id.* at 14-16.

[110] Professor David Armor, for example, has proposed an "equity choice" concept which would "allow parents or students to choose any public or private school within a reasonably large geographic area surrounding their residence, independent of school system boundaries," with school funds following the students in the form of vouchers or transfer payments. **Forced Justice**, *supra* note XXX, at 228. Armor's plan would permit some race-conscious decision making, by requiring receiving schools to give priority to transfers that improved the racial balance of the receiving school. *Id.* at 229. Professor Rossell supports a "public choice" model that leaves racial composition solely to parents' decisions, with incentives to desegregate only in the form of magnet schools to induce voluntary integrative choices. **The Carrot or the Stick**, *supra* note XXX, at 183-216. *See also* **John E. Chubb & Terry M. Moe, Politics, Markets & America's Schools** (1990) (arguing for a system based on parental choice of schools); **Learning from School Choice** (Paul E. Peterson & Bryan C. Hassel eds., 1998) (a series of essays generally supporting a

the basic design of public schooling, even in a political democracy otherwise committed to individual liberty and private choice.[111] The second response, following from the first, is that states or local school boards can plausibly conclude that the collective future of our schools (a majority of whose students are expected to be non-white by 2020)[112] and our society (a majority of whose members are expected to be non-white no later than the middle of the 21st century),[113] depends upon educating citizens who will be able to live and work comfortably across racial lines, and that integrated schooling is an indispensable means toward that compelling state end.[114] As Professor Jomills Braddock has argued:

> Schools do more than teach academic skills; they also socialize the young for membership in adult society. School desegregation is not simply an educational reform; it also reforms the socialization function of the schools. For this reason, U.S. society cannot avoid the pain of decisions about school desegregation simply by improving the quality of segregated schools.[115]

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system based on choice); **New Schools for a New Century: The Redesign of Urban Education** (Diane Ravitch & Joseph P. Viteritti eds., 1997) (same).

[111] *See generally*, **Amy Gutmann, Democratic Schooling** (1987)(reviewing major philosophic justifications for assigning authority over public education to various actors in the polity, and clarifying the public interest, in a democracy, in shaping educational policy); *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)(assuming the power of the state "reasonably to regulate all schools, . . . to require that all children of proper age attend some school, . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare"); Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (same).

[112] *See* **Gary Natriello, Edward L. McDill, & Aaron M. Pallas, Schooling Disadvantaged Children: Racing Against Catastrophe** 36-339 (1990) (projecting a decline in whites of school age from 70% in 1988 to 49% by 2020).

[113] **Bureau of the Census, U.S. Dep't of Commerce, 2000 Census**, NP-T5-G *Projections of the Resident Population by Race, Hispanic Origin and Nativity: Middle Series, 2050 to 2070* (showing that the white, non-Hispanic population of the United States will likely fall below 50% by July 1, 2060).

[114] *See* Derek Black, Note, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 **N.C.L. Rev.** 923, 943-65 (2001) (reviewing the extensive literature that finds considerable educational benefits from racially diverse schooling at elementary, secondary, and higher educational levels); john a. powell, *A New Theory of Integrated Education* XXX (2002) (reviewing the empirical support for the educational value of integrated education); *see also* **Michal Kurlaender & John T. Yun, Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville** (Aug. 2000) (finding positive educational effects from racial desegregation). .

[115] Jomills Henry Braddock II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, XXX **Phi Delta Kappan** 259, 260 (Dec. 1984)

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Finally, for those unmoved by broader arguments based on societal needs, a convincing body of evidence suggests that racial segregated schools are educationally detrimental to many individual students who attend them. This justification need not depend upon the theory, put forth by the Supreme Court in *Brown v. Board of Education*,[116] that segregation inflicts "stigmatic harm" on African Americans, a contention which has been the object of intense scholarly disagreement.[117] Nor need it directly depend on the substantial body of empirical evidence about the positive educational effects of racial desegregation on students in Southern jurisdictions,[118] or the suggestion that

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[116] 347 U.S. 483, 394 n.11 (1954) (citing research by Kenneth Clark, Franklin Frazier, and other social scientists for the general proposition that [t]o separate Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that ' . .. has a tendency to [retard] the educational and mental development of negro children'").

[117] The Court's reference in footnote eleven of *Brown* generated an extensive debate, both about the accuracy of the scientific evidence cited and about the propriety of resting major constitutional pronouncements upon shaky social scientific findings. See, e.g., Edmond Cahn, *Jurisprudence*, 30 **N.Y.U. L. Rev.** 150, 157-68 (1956)(questioning the quality of the expert evidence submitted in *Brown* and the wisdom of founding fundamental rights upon developing social scientific theories); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 **Law & Contemp. Probs.** 57 (Autumn, 1978) (faulting, not only *Brown*'s footnote eleven, but the broader tendency by the Supreme Court to rely upon social scientific evidence to support constitutional judgments); *see generally* Betsy Levin & Philip Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 **Law & Contemp. Probs.** 50, 53-56 (Winter 1975) (reviewing the academic and judicial controversy stirred by Brown's reliance upon social scientific evidence).

[118] Many studies have investigated the educational, psychological, sociological, and labor market implications of the move toward desegregated education. For example:

> (1) Some researchers have attempted to measure the impact of desegregation on the academic achievement of African American children (and sometimes, of white children as well). *See, e.g.*, **Nancy St. John, School Desegregation Outcomes for Children** (1975) (concluding, after an examination of forty-one prior studies on the academic effects of integration, that the evidence is mixed); Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 **Law & Contemp. Prob.** 17 (Summer 1978) (reporting that among 73 studies, 40 found positive, and only 12 negative effects); Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 **Law & Contemp. Prob.** 241 (Winter 1975) (concluding, after a review of numerous prior studies, that "overall, desegregation does indeed have a positive effect on minority achievement levels," although most studies suffer from definitional and methodological weaknesses).
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> (2) Other researchers have investigated whether school desegregation has had any positive effects upon the educational attainment, labor market prospects, or other "life chances" of blacks and/or whites. *See, e.g.*, James M. McPartland, *Desegregation and Equity in Higher Education and*

that more talented minority youth tend to underperform in schools attended by higher percentages of minorities.[119] Instead, the justification draws it power from the substantial body of evidence that students of whatever race who attend schools with high percentages of low-income students ("high-poverty schools") have significantly lower academic performances, on average, even after their own socioeconomic status and family

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Employment: Is Progress Related to the Desegregation of Elementary & Secondary Schools?, 42 **Law & Contemp. Prob.** 108 (Summer 1978); Henry M. Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 **Law & Contemp. Prob.** 217 (Winter 1975) (stressing the inherent limits of social science evidence in answering causal questions about the long-term effects of desegregation).

(3) Later researchers also sought to reexamine the Supreme Court's psychological conclusion that the segregation of public schools injures the self-esteem or aspirations of black children. *See, e.g.*, Edgar G. Epps, *The Impact of School Desegregation on the Self-Evaluation and Achievement Orientation of Minority Children*, 42 **Law & Contemp. Probs.** 57 (Summer 1978) (finding little significant evidence that either racial segregation or racial integration lower black self-esteem and aspirations, apart from independent socioeconomic effects); Edgar G. Epps, *The Impact of School Des[e]gregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 **Law & Contemp. Probs.** 300 (Winter 1975) (same).

(4) Still other researchers sought to determine the sociological or inter-group consequences of desegregation. *See, e.g.*, Janet Ward Schofield & H. Andrew Sagar, *Desegregation, School Practices, and Student Race Relations, in* **The Consequences of School Desegregation** 58 (Christine H. Rossell & Willis D. Hawley eds., 1983) (noting that the social impact of desegregation may be more important in influencing the future occupational and social success of students than in affecting academic outcomes); John B. McConahay, *The Effects of School Desegregation Upon Students' Racial Attitudes and Behavior: A Critical Review of the Literature and a Prolegomenon to Future Research*, 42 **Law & Contemp. Prob.** 77 (Summer 1978)(critiquing various earlier studies).

(5) Finally, researchers investigated the extent to which school desegregation has succeeded in increasing interracial exposure in education. *See, e.g.*, Christine H. Rossell, *Desegregation Plans, Racial Isolation, White Flight, and Community Response, in* **Consequences of Desegregation**, *supra*, at 13; Janet Eyler, Valerie J. Cook & Leslie E. Ward, *Resegregation: Segregation Within Desegregated Schools, in* **Consequences of Desegregation**, supra, at 126; Christine H. Rossell, *School Desegregation and Community Social Change*, 42 **Law & Contemp. Prob.** 133 (1978).

Many of these studies naturally crossed conceptual lines, offering remedial suggestions, for example, in light of research findings on achievement, social interactions, etc., or explaining later "life chances" in light of social interaction and/or academic achievement in integrated schools.

[119] *See* Eric A. Hanushek, John F. Kain, and Steven G. Rivkin, *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (Nat'l Bureau of Econ. Res., Jan. 2002) (finding a "strong adverse effect on achievement of Blacks"— especially blacks in the upper half of the schools' ability distribution— from attending schools with higher percentages of African Americans); **Charles L. Thompson, Research-Based Review of Reports on Closing Achievement Gaps 33** (North Carolina Educ. Res. Council, April 15, 2002) (noting that "[m]idle class black students actually suffer the greatest damage from segregation, scoring significantly lower in segregated schools than in an integrated setting").

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background have been taken into account. The empirical foundations of this "school composition claim" were put forward, without major controversy, in the otherwise highly controversial "Coleman Report" that was issued by the Department of Education in 1966.[120]

Most of the controversy stirred by the Coleman Report stemmed from its empirical conclusion that black and white schools, at least within the nation's various geographical regions, appeared to have relatively similar educational resources,[121] a finding which undermined widely shared assumptions about the inadequacy of resources at African American schools, especially in the segregated South. Equally controversial was the Coleman Report's conclusion that students' own family and socioeconomic backgrounds, not any resource inequities in the schools they attended, appeared to explain most of the differences in their academic achievement.[122]

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[120] **Coleman, Equality of Educational Opportunity**, *supra* note XXX. The Coleman Report had been commissioned in response to § 402 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241,247 tit. IV, § 402, (codified at 42 U.S.C. § 2000c-1.(1966)) to document inequities in the provision of educational resources, by race, throughout the nation. The project became associated with its principal investigator, Professor James Coleman of Johns Hopkins University. Coleman and his colleagues, reading their research mandate very expansively decided to investigate not only what educational resources were being provided, but whether schools were attaining similar outcomes in student achievement, and to analyze the relationship between the resources being provided and the achievement attained.

In a masterful reexamination of the Coleman Report, Professors Daniel Moynihan, Frederick Mosteller and fifteen of their colleagues subjected the Report to searching substantive and methodological scrutiny. *See* **On Equality of Educational Opportunity** (Frederick Mosteller & Daniel P. Moynihan eds., 1972) (hereinafter "Mosteller & Moynihan"). Mosteller and Moynihan, in describing the social and political circumstances that prompted the Report, linked it expressly with the inauguration of the use of modern social scientific methods in the service of national policy. *Id.* at 3-4. The Report itself--the "second largest social science research project in history," involving data on 570,000 pupils, 60,000 teachers, and 4000 schools, id. at 5--was considered by Mosteller and Moynihan to be "the most important effort of its kind ever undertaken by the United States government:" *Id.* at 4-5.

[121] The Report concluded that both inter-regional differences and metropolitan-rural differences in resource allocation were greater than racial differences. **Educational Opportunity**, *supra* note XXX, at 12.

[122] In blunt language, the Report concluded,

> schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and . . . this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational

Almost overlooked by those disturbed by these central conclusions from the Coleman Report was another striking finding:

> [A] pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school. . . Thus . . . if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.[123]

The Report concluded, in fact, that the social characteristics of a school student body were the single most important factor in predicting minority student achievement:

> *Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff.*[124]

Since the Coleman Report's uncongenial findings about resource parity made it unpopular in the civil rights community,[125] initial support for the Report's school social composition findings tended to come not from the political left or supporters of desegregation, but from the center and right.[126] Gradually, however, academic support for

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opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American schools. *Id.* at 325

[123] Id. at 22.

[124] Id. at 302 (emphasis in original). Later in the Report, researchers reemphasized that "characteristics of facilities and curriculum are much less highly related to achievement that are the attributes of a child's fellow students in school." *Id.* at 316. In the Report's final summary on achievement, other factors were once again dismissed as of little importance: "no school factors account for much variation in achievement, [although] teachers' characteristics account for more than any other. . . . [T]he social composition of the student body is more highly related to achievement, independently of the student's own social background, than is any school factor." *Id.* at 325.

[125] The finding was featured, however, in the Kerner Commission Report which was promulgated by a distinguished Presidential panel appointed in the wake of the urban riots of 1965-67. **Report of the Nat'l Advisory Comm'n on Civil Disorders** 427 (Bantam Books 1968) (citing the Coleman Report's finding on the school composition effect). It was also noted in an important report issued by the United States Commission on Civil Rights, *Racial Isolation and the Outcomes of Education, in* **Racial Isolation in the Public Schools** 72-124 (1967).

[126] One of the most provocative reanalyses of the Coleman data came in 1972 from Christopher Jencks, **Christopher Jencks et al., Inequality: A Reassessment of the Effect of Family & Schooling in America** (1972), whose writings on education prompted a host of strong denunciations from African American scholars and others. *See* Ronald Edmonds et al., *A Black Response to Christopher Jencks's Inequality and Certain Other*

this proposition deepened within the academic community and among school reformers. In 1977, as part of the first Congressionally-mandated study of compensatory education programs, Alison Wolfe examined the relationship between a student's location and his or her achievement,[127] and found that "[f]or the country as a whole, the correlation [between the proportion of a school's pupils in poverty and its average achievement level] is about .5 or .6. No other single social measure is consistently more strongly related than poverty to school achievement."[128] Five years later, Professor Karl White attempted to evaluate 101 previous studies examining the strength of the relationship between individual student

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Issues, 43 **Harv. Educ. Rev.** 76 (1973) (containing an essay by ten leading black scholars who fault Jencks and his colleagues for a variety of methodological, ideological, intellectual, and moral errors, especially their seeming suggestion that any failure in education is the inherent fault of poor and minority children themselves, and not the remediable fault of public schools and public policy); Stephan Michelson, *The Further Responsibility of Intellectuals*, 43 **Harv. Educ. Rev.** 92 (1973) (faulting Jencks for his failure to analyze the actual processes of education, the economic function of education in allocating scarce jobs, or the structural role schools play in our society); Lester Thurow, Proving the Absence of Positive Association, 43 **Harv. Educ. Rev.** 106 (1973) (criticizing the methods, presentation, and conclusions of **Inequality**). Jencks nonetheless explicitly concurred with Coleman that "[t]he achievement of lower-class students, both black and white, was fairly strongly related to the socioeconomic level of their classmates." Christopher S. Jencks, *The Coleman Report and the Conventional Wisdom, in*_ Mosteller & Moynihan, *supra* note XXX, at 69, 71. This is one of only nine principal findings reported by Jencks; it is the only finding that identifies any significant school-based effect on student achievement. *Id.* at 70-71.. schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and . . . this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American schools.

[127] **Alison Wolf, The Relationship Between Poverty and Achievement** (National Institute of Education, Compensatory Education Study Group 1977).

[128] **Wolf,** *supra* note XXX, Summary at II. Dr. Wolf reported that an individual's own family income was correlated with his or her achievement at a .3 level. The far higher correlation of .5 between school poverty level and student achievement was independent of a student's background and represented an independent school effect. That effect was strongest in those areas, such as large city school districts, that were marked by extreme economic contrasts among neighborhoods. "In other areas, where housing is less economically segregated, or where desegregation has changed school attendance patterns, the relationship is less close, and shows wide variations." *Id.* at 9.

achievement and family socioeconomic status.[129] When he turned his attention from the socioeconomic status of individual students to "schools or other aggregated groups," Professor White found that the overall socioeconomic composition of schools seemed more predictive of academic achievement than did a student's individual socioeconomic status.[130]

Professor Mary Kennedy of Michigan State and her colleagues oversaw preparation of a 1986 report, addressing the relationship between poverty and student achievement.[131] In that report, Professor Kennedy reconfirmed the findings of earlier research that high rates of school poverty seemed to affect individual student achievement adversely.[132] Three years later, in 1989, Professors Mayer and Jencks reported that other ongoing research tended to

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[129] Karl R. White, *The Relation Between Socioeconomic Status and Academic Achievement*, 91 **Psych. Bull.** 461, 463-64. (1982). Professor White concluded that "home atmosphere" was most predictive of academic performance, including such intangible factors as parents' attitudes toward education, parents' aspirations for their children, and other factors not directly correlated with traditional measures of socioeconomic status, such as occupation, income, or educational level. *Id.* 466-71.

[130] *Id.* at 475.

[131] **Mary M. Kennedy et al., Office of Educ. Res. & Improvement, U.S. Dep't of Educ., Poverty, Achievement and the Distribution of Compensatory Education Services** D18-D60 (1986). The portion of this work which addresses the effects of the social composition of schools was authored by David E. Meyers.

[132] The summary drew a sharp distinction between the individual effects of poverty and school effects:

> NIE . . . found that family poverty was in fact related to students' educational achievement. Generally speaking, a youngster's chances of doing well in school were diminished if he or she came from a poor family. The association between family poverty and student achievement was not especially strong, however. There were still many poor youngsters who did well in school, and many low achievers who were not poor. On the other hand, when looking at *schools* rather than individual children within the schools, the association was much stronger: schools with large proportions of poor students were far more likely to exhibit lower average achievement scores than other schools. . . . A rather large body of research now exists confirming these findings.

Id. at II-5 to 6.

confirm the relationship between student attendance at schools with high socioeconomic composition and improvements in achievement test scores.[133]

These results seemed consistent with, and indeed, explanatory of, otherwise puzzling (and to some, offensive) findings about school desegregation that suggested that, while desegregation brought positive achievement gains for African American children, nonetheless, at some level, an increase in the proportion of black children in a desegregated school began to become associated with a decline in average achievement.[134] Professors Crain and Mahard, discussing such findings in 1981, speculated that they might reflect, not any specifically racial phenomenon, but instead, underlying socioeconomic differences (and implicitly, poverty-concentration effects):

> The finding that schools with smaller black populations have higher achievement can be explained in two ways. First, if the main effect of desegregation is to place students from low-income families into schools with affluent students, the more white students, the greater income level in the school. (We cannot test this directly, since none of the 93 studies [Crain and Mahard relied upon] reported the actual social class of either the black or white students.) Secondly, a smaller black population makes it more difficult to resegregate the school by creating an all-minority class of supposedly low-ability students.[135]

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[133] Susan E. Mayer & Christopher Jencks, *Growing Up in Poor Neighborhoods: How Much Does It Matter?* 243 **Science** 1441, 1442 & nn. 15-16 (1989) (citing both Professor Kennedy's 1986 findings and their own study). Professors Mayer and Jencks indicated that these studies had uncovered "what could be sizable [achievement] effects" from school socioeconomic composition, though they noted that "neither [study] properly controls for skills of students when they enter school." *Id.* at 1442-43. Mayer and Jencks also reported that their study indicated that "a high school's mean SES has more impact on the cognitive skills of black students than the cognitive skills of white students." *Id.* at 1442.

[134] *See, e.g.*, **Policy Implications of Research**, *supra* note XXX, at 74 (reporting the results from several studies, indicating that in the South, "[a]chievement reaches a peak for [desegregated] schools between 19 percent and 29 percent black and drops off on either side in a reasonably steady manner," while in the North, the pattern, though more complex, still reflects "a high point in the 9 percent to 18 percent range, with a decline in both directions").

[135] *Id.* at 75.

More recently, additional research has confirmed the adverse academic impact of school composition effects.[136] In early 1993, the **Chapter 1 Final Report**, as indicated

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[136] Judith Anderson and other researchers from the United States Department of Education reported "a definite relationship" between the average scores of eighth graders on reading, mathematics, history, and science achievement tests and the school poverty levels, especially within the two poorest categories of schools. **Judith Anderson et al., Poverty and Achievement: Reexamining the Relationship between School Poverty and Student Achievement** 5 (U.S. Dep't of Educ., Office of Educ. Res. & Improvement 1992). Anderson grouped all schools into seven categories, ranging from schools with no poor students to schools with 51-75 percent and 76-100 percent poor students respectively. Anderson then examined the average scores of students, on each of the achievement tests, within each of the school poverty categories. On each of the exams, there was a steady decline in average performance as the percentage of poor students increased. Id. at 5 tbl. 1.

Aware that students from lower socioeconomic family backgrounds perform, on average, at lower levels, and that poor schools contain more poor students, Anderson sought methods to disentangle the individual effects from the schools effects. She decided to group students into four quartiles, based upon their own family socioeconomic status, and then to examine the performance of these students in school that had been grouped by their percentage of poor students. She found that although upper quartile (highest SES) students consistently outperformed lower quartile students, significant average drops in achievement occurred, among students in all SES quartiles, as the poverty levels of the schools they attended began to increase. Schools falling into the two highest poverty categories had sharply diminished numbers of students scoring in the top quartile on achievement tests. For example, while 20 percent of students in schools with poverty populations between 31 and 50 percent scored in the highest quartile (only 5 percent below the 25 percent norm), when the poverty population increased to 51-75 percent, only 10 percent of students scored in the top quartile, and among schools with poverty rates above 75 percent, only 5 percent of the students were in the top quartile. Indeed, in these highest poverty schools, only 19 percent of the students managed to place above the 50th percentile on reading, and only 18 percent on mathematics. *Id.* at 11, tbl. 4.

Nonetheless, Anderson was careful to caution that readers "should not attempt to infer causation" from her findings, since there was insufficient information on other factors that may have influenced these outcomes, including the social composition of schools the sample may have attended in their earlier years, and how their family circumstances might have changed over time. *Id.* at 3-4.

[136] In another report published in 1992, Eric Camburn, of the National Opinion Research Center at the University of Chicago, described his findings after an examination of national High School and Beyond data to determine what factors influenced students from the nation's large metropolitan areas to apply to, attend, and graduate from, four-year colleges. Eric M. Camburn, *College Completion among Students from High Schools Located in Large Metropolitan Areas*, XXX **Am. J. Educ.** 551 (1990). Camburn found that, as expected, a student's intention to attend college, socioeconomic status, academic record and performance on standardized tests were all predictive of each step in the college completion process: application to college, attendance at college, and ultimate graduation from college. Id. at 563.

In addition, however, Camburn found that "the percentage of whites in a student's high school[] was . . . the strongest predictor among all high school characteristics." More specifically, attendance at a high-minority school had an adverse impact on the likelihood of college completion that was independent of a student's own race, socioeconomic background, grades or standardized test scores. Camburn suggested the "likel[ihood] that one of the major reasons minority-dominant students are less likely to persist [toward attainment of a college degree] is that they are receiving inadequate preparation for the academic rigors of college." Id. at 566.

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earlier,[137] opened its report to Congress with a 25-page analysis highlighting the substantial achievement gaps it had uncovered between students attending high-poverty schools and those in low-poverty schools.[138] The **Final Report** noted the "important effects of school poverty . . . on individual student performance,"[139] and underlined the disproportionate burden that, because of their attendance at high-poverty schools, was borne by racial and ethnic minority students: minority children comprise 77 percent of the student bodies in high-poverty schools, and in 45 percent of the nation's high-poverty schools, the average enrollment is over 90 percent minority.[140] Several recent studies have concluded that attendance at high-poverty schools brings adverse, long-term, non-academic consequences as well.[141]

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[137] *See supra* text accompanying notes XXX - XXX.

[138] **Final Report**, supra note XXX, at 14-38.

[139] *Id.* at 16.

[140] *Id.* at 17. Although the **Final Report** chose to emphasize these findings, it conceded that the processes by which socioeconomic composition affects individual student achievement are not yet well understood, and it therefore declined to offer specific advice on how schools might reduce or eliminate the effects, other than to urge that "reforms much be comprehensive and systematic" in high-poverty schools. Id. at 37.

[141] Professor Susan Mayer analyzed data on 26,425 students who were tenth grade students in 1980 and who submitted to follow-up interviews two years later, finding that "students who attend high-SES schools are less likely to drop out and less likely to have a child than students of the same race and socioeconomic background who attend lower-SES schools." Susan E. Mayer, *How Much Does a High School's Racial and Socioeconomic Mix Affect Graduation and Teenage Fertility Rates? in* **The Urban Underclass** 321, 325 (Christopher Jencks & Paul E. Peterson eds., 1992). Furthermore, Professor Mayer calculated, the positive effects of moving low-income students from a high-poverty to an average schools are significantly greater than the small negative effects of moving high-income students from low-poverty to average-poverty schools. *Id.* at 327. Professor Mayer noted that when she controlled for a school's socioeconomic mix, the racial composition of the school "had only a small and statistically insignificant effect on dropping out or on teenage childbearing, and the proportion of students who are Hispanic had a statistically reliable effect only on dropping out." Id. at 328-29.

Employing a very different methodology, Professor James Rosenbaum of Northwestern University and his colleagues have studied for two decades the experience of 4500 low-income families who are participating in a unique program carried out in the Chicago area as part of the settlement of a major housing lawsuit, *Hills v. Gautreaux*. *See* **James E. Rosenbaum & Susan J. Popkin, Center for Urban Affairs & Policy Research, Northwestern Univ., Economic and Social Impacts of Housing Integration**

In one perceptive recent article, Professor Sheryll Cashin, the former Deputy Assistant Secretary for Empowerment Zones in the Clinton Administration's Department of Housing and Urban Development, examined the many factors that currently draw middle-class African Americans in the Washington, D.C. area to predominantly black suburban communities in nearby Prince George's County, Maryland. Although she stresses the powerful social and psychic benefits these communities offer many African Americans, who find themselves weary or embittered by struggle in integrated residential settings,[142] she also notes that the consequences for their children's schooling have been largely negative:

> The Prince George's County public schools have the second lowest test scores in the state of Maryland. 'About 32 percent of all its third-, sixth- and eight-grade students scored at a satisfactory level or better on the Maryland School Performance Assessment Program last year, well above Baltimore City's 16 percent score but well below top-rated Howard County's 60 percent.' . . .
>
> In addition to funding problems, Prince George's County schools have a higher concentration of low-income students than do other suburban school systems in the region – another possible contributor to the county's low school performance. Given the performance and funding problems of Prince George's County schools, many affluent [black] families are opting out of the public school system.[143]

(1990) (report to the Charles Steward Mott Foundation). Under the terms of the *Gautreaux* settlement, families living in public housing projects in Chicago have been offered the opportunity to move into subsidized apartment units elsewhere within the City of Chicago or to its predominantly white, middle-income suburbs; since 1976, over 4500 families have participated in the program, and roughly half have moved to the suburbs. *See* **James E. Rosenbaum et al., Center for Urban Affairs & Policy Research, Northwestern Univ., Low-Income Black Children in White Suburban Schools** (1986) (report to the Spence Foundation of Chicago). Professor Rosenbaum and his colleagues have followed the *Gautreaux* families, examining not only their subsequent labor force experiences, but also the experiences of their children, thrust from inner city Chicago schools into middle-class, suburban schools. In his first study, carried out in 1982, Professor Rosenbaum reported that on a range of measures such as drop-out rates, participation in college-track courses, and college attendance, suburban movers had far better outcomes.

[142] Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 **Cornell L. Rev.** 729, 743-751 (2001).

[143] *Id.* at 759-60, *quoting* Erin Texeira, *Prince George's: A Dream Revisited*, **Balt. Sun** , Jan. 18, 1999, at A1. *See also* Susan E. Eaton & Elizabeth Crutcher, *Magnets, Media, and Mirages*, *in* **Dismantling Desegregation,** *supra* note XXX, at 265-89 (suggesting that earlier, laudatory accounts of Prince George's County's success with a magnet school approach vastly overstated its academic and educational achievements).

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The implications of this vast body of "school composition" evidence for the future of North Carolina's resegregating public schools should be clear. Since a significantly higher percentage of African American, Hispanics, and Native American children in North Carolina (and elsewhere throughout the South and the nation) live in low-income families,[144] as North Carolina schools grow more racially segregated, they will

simultaneously re-stratify along economic lines, producing high-poverty schools populated disproportionately by African American, Hispanic, and Native American students, and low-poverty schools, populated disproportionately by non-Hispanic whites. Much of the existing research on the adverse effects of attending high-poverty schools treats the challenging socioeconomic mixture of these schools as an irrevocable fact, lamenting the difficulties of reaching children in these schools.

Yet the trends toward resegregation and economic isolation are already manifesting themselves in a number of North Carolina's urban districts. For example, in Winston-Salem/Forsyth, where a "schools of choice" program has been in place since 1995-96,[145] by 2001 the student populations in at least ten of the district's fifty-four elementary schools had become 80% black or greater. Every one of those highly segregated black schools had a student population in which at least 63% percentage of the student population was poor (eligible for free or reduced-price lunch), and in seven of

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[144] **Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2001** at 445, tbl. 685 *Families Below Poverty Level and Below 125 Percent of Poverty by Race and Hispanic Origin: 1970 to 1999* (reporting consistent rates of family poverty among African American and Hispanic families more than twice as high as rates for white, non-Hispanic families).

[145] Douglas Punger, *Winston-Salem/Forsyth County Schools Magnet School Assistance Grant Application* IV-17 (undated and unpublished manuscript, on file with the *North Carolina Law Review*)

the ten, the poverty percentages ranged from 80% to 94%. By contrast, at least eight of Winston-Salem/Forsyth's districts elementary schools had white student populations in excess of 80%. None had a poverty rate over 50%.[146] Similar correlations between a school's racial composition and its poverty composition are present in Charlotte-Mecklenburg, Cumberland, Guilford, and many smaller school districts throughout the State.[147]

Moreover, as school composition research predicts, average academic performances in North Carolina's "high poverty" schools typically fall well below those among students in more affluent student bodies. For example, only one of the ten Winston-Salem/Forsyth elementary schools enrolling a nonwhite population above 80% had as many as 70 percent of its students attaining proficient scores on statewide end-of-grade tests in 2000-01, and among those schools with poverty populations in excess of 80%, the percent of students attaining proficient scores ranged from 47% to 62%.[148]

Exceptions do exist, of course. For reasons that are not generalizable, some predominantly minority, high poverty schools have student bodies that perform at unexpectedly high levels. The Superior Court in North Carolina's school finance litigation pointed this fact out in one of its orders, and directed the parties to examine five such schools to determine what pedagogical or leadership lessons might be derived from

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[146] *See* **State of North Carolina, Dep't of Pub. Instruction,** *ABC's Growth and Performance Results, Forsyth/Wake County*, available at: http://www.ncpublicschools.org/abcs. (The data set contains pertinent information on only 41 of Forsyth's 54 elementary schools, so the data likely underreport the extent of black/white resegregation at the elementary school level.)

[147] *See* John Newsom, *Dismantling Desegregation as Busing Fades, Local Schools Are Becoming More Segregated*, **News & Record** (Greensboro) Aug. 19, 2001, at A1 (noting that 18% of all Guilford's African Americans were attending schools that were over 90% black in 2000-01, up from 10% in 1993);

[148] *See* **State of North Carolina, Dep't of Pub. Instruction,** *ABC's Growth and Performance Results, Forsyth/Wake County*, available at: http://www.ncpublicschools.org/abcs.

their relative success.[149] However, during the subsequent hearing, North Carolina's educators and attorneys could point to no consistent pattern of high academic performance in any of these schools, much less a coherent group of educational methods that has worked to assure high performance in high poverty schools.[150] In this North Carolina is not alone. While some researchers contend that educators in East Harlem or El Paso—or indeed, several thousand schools nationwide—have identified pedagogic methods that can empower any willing and able educators to reach all children whatever their socioeconomic circumstances or the overall poverty level of their schools,[151] the amount of evidence to confirm these hopeful contentions remains, sadly, all too slim.

F. Conclusion: North Carolina's Steady Drift Toward Racial Resegregation, Will Have Educationally Harmful Consequences

This paper has argued to this point that schools in North Carolina, and the South more generally, face the prospect of rapid resegregation and increasing educational inequality as the consequence of several related forces: (1) the imminent end of court-ordered desegregation decrees in most areas; (2) a new Fourth Circuit prohibition on

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[149] Memorandum of Decision, *Hoke County*, Mar. 26, 2001, *supra* note XXX, at 58-60 (describing the five schools, including West Hoke Middle School, Kingswood Elementary School in Wake County, Gaston Middle School in Northampton County, Baskerville Elementary School in Rocky-Mount/Nash County, and Winstead Elementary School in Halifax County). *See also* Memorandum of Decision, *Hoke County Bd. of Educ.*, April 4, 2002, *supra* note XXX, at 24 (describing the subsequent hearing on the five successful school districts).

[150] *See* Memorandum of Decision, *Hoke County Bd. of Educ.*, *supra* note XXX, at 73-74 (noting that '[t]he majority of successful schools whose principals testified at the hearings still have many Students below Grade Level and have not been able to maintain their levels of at-risk success in 2000-01," and that, indeed, "four of the five schools the Court identified as successful failed to meet even expected growth [under North Carolina's accountability standards]for 2000-01, receiving 'no recognition' status").

[151] *See, e.g.* **Craig D. Jerald, Dispelling the Myth Revisited: Preliminary Findings from a Nationwide Analysis of 'High-Flying' Schools** (Education Trust, 2001) (examining 4,577 schools nationwide in which: (1) average student's reading or mathematics scores are in the top one-third of those statewide at that grade level; (2) and at least 50% of the students are *either* minority or low-income or both); **The Charles A. Dana Center, Univ. of Texas, Hope for Urban Education: A Study of Nine High-Performing, High-Poverty Urban Elementary Schools** (1999); *see also* Ronald R. Edmonds, *Making Public Schools Effective*, 12 **Social Pol'y** 56-60 (1981) (setting forth, though without supporting data, a classic argument that effective pedagogical and leadership methods can suffice to lift student performances in low-income and minority schools);

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school boards' voluntary use of race-conscious student assignment plans, even to ensure racially integrated schools; (3) a drift by many school boards toward assignment policies based on neighborhood schools, or plans such as 'schools of choice' that allow parents options that, exercised collectively, create resegregative outcomes; (5) the demographic certainty that *as* schools attended by nonwhite students become more racially segregated, their overall poverty levels will grow steadily as well; and (6) the evidence that both North Carolina's racial achievement gap and the "high poverty" conditions that inevitably accompany resegregation will place children who attend these resegregating schools at substantially higher risk of poor academic performance—whatever their personal academic potential—simply because of the "school composition" effects from the schools they attend. In addition, of course, racial resegregation will result in the loss of the many educational benefits that researchers and lay people alike have ascribed to integrated public education.[152]

What makes Southern resegregation such a special educational tragedy is that, unlike the fragmented, often racially homogeneous school districts of the Northeast and North Central states—which make racial and socioeconomic integration almost impossible—most Southern metropolitan and smaller districts have historically been countywide. Thus the all-but-inevitable educational injury widely experienced in many Northeastern and North Central metropolitan areas could be ready avoided— if federal courts would allow voluntary Southern school boards to seek and maintain educational diversity in their elementary and secondary schools, or if, as Wake County demonstrates, school boards

[152] *See generally*, john a. powell, *A New Theory of Integrated Education* (2002) (cataloging the harms of segregated education, and the corresponding values of integration).

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could summon sufficient political will to assign students under alternative criteria that would avoid the most educationally debilitating effects of high-poverty schools.

These facts pose a major policy challenge, one that should give parents and educational policymakers, and even our "colorblind" federal courts, great pause. Yet this emerging challenge is simply one component of the broader educational storm currently brewing. As we will see in this paper's next section, these patterns are certain to bring huge, unintended challenges as North Carolina steadily raises the educational bar through its accountability system, now federally mandated by the No Child Left Behind Act.

II.

SCHOOL ACCOUNTABILILTY: UNINTENDED CONSEQUENCES?

A. A Brief Look at the Development of the Accountability Approach

The shift toward state-designated accountability goals and measures for public schools and students is one of the most significant developments in American education during the past generation. It was spurred in part by *A Nation at Risk,*[153] which in 1983 lamented the mediocrity of American schools and cautioned that unless American students were held to higher educational standards, they would fall further behind student peers in other nations. At risk, critics of contemporary education contended, were not only the individual futures of these failing children, but the nation's preeminence in world science, technology, and trade. By the end of President Ronald Reagan's first term in 1984, some researchers, school reformers, and business leaders began to converge on a

[153] **The Nat'l Comm'n on Excellence in Educ., United States Dep't of Educ., A Nation at Risk: The Imperative for Educational Reform** (1983).

an ambitious agenda to raise educational standards nationwide.[154] Others saw the prospect of using accountability as a tool to promote greater equity in public education.[155]

The proper solution, these post-1983 advocates contended, depended upon an interrelated series of reforms to demand outcome accountability from every actor in the system: *first*, by setting high educational goals for every student and school; *second*, by providing carefully designed curricula moving students directly toward those goals; *third*, by regularly measuring student progress through uniform, statewide tests; *fourth*, by providing incentives —both rewards and punishments—to motivate all those in the system; and *fifth*, by freeing local authorities —teachers, principals, and school boards—

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[154] David K. Cohen, *Standards-Based School Reform: Policy, Practice, and Performance* **in Holding Schools Accountable: Performance Based Reform in Education** 99 (Helen F. Ladd, ed., 1996). *See also* Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 **Harv. C.R.-C.L.L. Rev.** 55, 59-60 (1987) (observing that the push for state standards in education was one "major product" of the reform movement reflected in the 1983 report).

The educational world had witnessed an earlier campaign to institute higher promotion and graduation standards in the 1970s, when a "minimum competency" movement enjoyed some success. It met with strong opposition, however, because of concerns about fairness. The South and schools in other regions had only recently embarked on efforts to desegregate their public schools and to undo past inequities in education based on race. As a result, denying a diploma to students who could not pass an exit examination seemed to punish the victims of past discrimination for having attended inferior schools. Placing students who failed these tests in special remedial classes, moreover, risked resegregation of schools that had only recently been ordered to achieve racial balance in the student body. These objections had combined in the late 1970s to slow the implementation of high-stakes testing. Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 **Akron L. Rev.** 107, 109-10 (2000); *see* Debra P. v. Turlington, 474 F. Sup. 244 (M.D. Fla. 1979), *aff'd in part and rev'd in part*, 644 F.2d 397 (5th Cir. 1981 (rejecting, as contrary to federal Due Process and Equal Protection Clause standards, Florida's imposition of high school graduation standards on students, especially formerly segregated African American students, who had not been exposed to the underlying material).

[155] *See, e.g.*, Chambers, *Adequate Education, supra* note XXX at, 60-67 (1987) (discussing how state standards might be used to demand a minimally adequate education under state statutes and constitutional provisions); James S. Liebman, *Implementing* Brown *in the Ninties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 **Va. L. Rev.** 349 (1990) (outlining a legal strategy to capitalize on the state standards movement to the benefit of poor and minority students); *see also* **Citizens Comm'n on Civil Rights, Title I at Midstream: The Fight to Improve Schools for Poor Kids** 7-18, 26-28(Corrine M. Yu & William L. Taylor eds., Fall, 1998) (arguing that the reauthorization of Title I by Congress in 1994 imposed an obligation on states to develop meaningful standards and accountability requirements, offering great promise to low-income and minority children, but that the federal obligations that were being widely ignored).

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from much state regulation. The theory assumed that, once unshackled from centralized bureaucratic constraints and given freedom to innovate in response to perceived local student needs, educational "managers" would employ ingenuity and initiative to tailor education services to achieve high goals.[156]

Although a few states such as Connecticut began adopting accountability principles as early as the mid 1980s, and although Florida and other states experimented with statewide high school exit examinations,[157] it was only in the 1990s that more comprehensive accountability models emerged in Texas, Kentucky, North and South Carolina, and other states undergoing large-scale educational reform in the wake of successful school finance lawsuits. When students in some of these states showed marked improvement on major national tests of student achievement, such as the National

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[156] A number of implicit criticisms of the then-current educational scene were evident in this new approach. For those who saw American students languishing in mediocrity, the imposition of high standards promised to set the educational bar higher. Much of the nation's educational energy in the decade between 1964-1974 had been expended in the struggle over the integration of formerly segregated public schools. Subsequently, courts and educators struggled to respond to the school finance reform campaigns of the 1970s and 1980s—with their focus on parity in funding for teacher salaries, buildings, and equipment. The accountability movement promised something new; it turned the attention of educators from issues of equality in access or services toward equality in educational "outputs," concrete educational gains for all students.

Moreover, after decades during which federal and state concern with public education seemed to manifest itself principally through a stream of statutes, regulations, and/or court decisions, many saw the promise of greater local control and autonomy for principals and teachers as a great boon. "Site-based management"—allowing those at the scene to make key decisions— reflected the emerging consensus of industrial managers and educational reformers.

Other critics of public education suggested that teachers and administrators were largely exempt from the normal demands and expectations faced by other workers. Their tenure and/or union contracts shielded them from effective accountability to anyone—principals, parents, or students themselves—and inattention and ineptness were too frequently the result. Clear goals and regular measurement of progress, these critics suggested, would reinvigorate the teaching profession and identify those (hopefully a small minority) who had ceased to do their proper job.

[157] *See* **High Stakes**, *supra* note XXX, at 56-57, 163-64 (briefly recounting these efforts).

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Assessment of Educational Progress ("NAEP"), other states throughout the South and elsewhere began to adopt similar approaches.[158]

B. North Carolina's Commitment to Accountability: The "ABC's of Education"

North Carolina laid its foundation for an accountability approach in 1986, by adopting a comprehensive Basic Education Plan ("BEP") that specified uniform curricular and other input standards for all elementary and secondary schools.[159] In 1989, North Carolina launched a major experiment with accountability by authorizing its State Board of Education to develop and implement a "performance-based accountability program," that would allow local school districts to set student performance goals or

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[158] Another principal explanation for the rapid spread of accountability principles lies with the federal mandates that accompanied the reauthorization of Title I of the ESEA in 1994. Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3581, 20 U.S.C. §§ 6301 et seq. (1995). As the nation's most extensive federal spending program for public elementary and secondary schools, Title I has gone through a number of semi-total transformations in basic approach since its original enactment in 1965. Statutes and regulations that once encouraged schools to teach needy children in separate "pull-out" classes have yielded to demands that schools deliver such services within mainstream classroom settings whenever possible. More pertinent, an earlier approach that stressed the need to teach "basic skills" to low-performing students in the 1980s was replaced in 1994 with the demand that schools impose "high academic expectations" on all children. This shift in educational strategy meshed well with accountability principles, since it encouraged systemwide testing to discern whether all students are learning, and it does not shy away from requiring poor and minority students to meet the same academic standards as other students. Since the Title I program dispensed at least $6.2 billion to school districts in every state in 1999-2000, it seems clear that the dramatic shift toward accountability during the 1990s was impelled in substantial measure by the desire of state legislatures to bring themselves into compliance with the Title I requirements in order to be eligible for the continued receipt of this important source of federal funding. *But see* **Citizen's Comm'n, Title I in Midstream**, *supra* note XXX , at 26-28 (lamenting the failure of states to comply faithfully with these provisions).

[159] For the first time, the General Assembly directed the State Board of Education to develop a statewide Standard Course of Study—a uniform, sequential curriculum that would assure regular progression in every major subject area from grade to grade, everywhere in the State. The BEP also specified class sizes and teacher/student ratios, and it committed the State to pay for schools' operational costs, including teacher salaries. The BEP did not provide for all local school districts needs; for example, no funds were allocated for capital expenditures such as school construction and repair. Moreover, the General Assembly never fully funded the BEP. Still in all, the BEP started North Carolina on the road toward a uniform state curriculum.

indicators.[160] Pursuant to the 1989 act, the State Board developed, and in 1992-93 began to administer, statewide end-of-grade ("EOG") tests to all children in grades three through eight, as well as end-of-course ("EOC") tests for students in high schools.[161] The 1989 act also authorized the State Board to issue annual "report cards" for each school district, indicating its progress toward improvement of student performance, taking into

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[160] The State Board was directed to develop tests and other measures (such as attendance rates, dropout rates, parental involvement, and post-secondary outcomes) that could chart progress toward those goals. School Improvement and Accountability Act of 1989. Session Laws of 1989, Ch. 778, sec. 3, *codified at* **N.C. Gen. Stat.** Sec. 115C-238.1. Initially, the program was optional; to encourage local schools to participate, the statute offered local districts broad exemption from many reporting obligation and waivers from many State regulations and other obligations, including increased financial flexibility. *Id.*, *codified at* §115C-238.2. In exchange, schools electing to participate were required to develop local school improvement plans.

[161] *Id.*, §4, *codified at* §115C-174.11(c). The General Assembly initially contemplated in 1986 that the State Board might acquire commercially available statewide tests, but in the 1989 legislation, the General Assembly directed the State Board itself to develop tests that could test students on the core academic competencies prescribed by the Standard Course of Study, so that North Carolina principals and teachers could see how well their students were absorbing the very curriculum that the BEP prescribed.

The North Carolina end-of-grade tests employed by the ABC's were not developed by educational testing specialists. Instead, the officials of the Department of Public Instruction ("DPI") assembled a cross-section of teachers from all parts of the State in the early 1990s. After these teachers had drafted and submitted proposed test questions, the DPI officials selected among the various questions, then tested them in field trials, and finally settled on the content of the tests for each grade. Doug Haynes, *Grading Our Schools '99*, 19-20 (North Carolina Alliance for Smart Schools/John Locke Foundation, September, 1999). The obvious intent was to assure that children were tested on those items that they were actually being taught every day in school. Critics of the approach, however, note that the teachers who drafted the questions were neither "testing experts or uniquely qualified in their academic field." *Id.*, at 19. The State Board has explained that the tests measure a variety of "higher-level thinking skills," not just rote memorization of facts, and that "[t]he test development process includes a stage where teachers, university professors, DPI curriculum and test development specialists and others classify test questions based on the thinking skill level required." North Carolina State Board of Education, *"Testing Started with the ABCs" and Other Myths About Testing and Accountability in North Carolina*, 2 (http://www.ncpublicscschools.org/parents/myths.html).

The adoption of the current testing approach did not proceed without serious disagreement at the state level. A Standards and Accountability Commission appointed in 1993 to develop the standards and goals for students released a report in July of 1996, criticizing the testing program in a number of respects. Rather than multiple-choice examinations, the Commission recommended assessment based on simulated "real-world use of knowledge," employing multiple measures of performance. The Commission's suggestions were not adopted; instead, the Commission was disbanded in 1997, and a new Committee on Standards and Accountability was created to advise the State Board on student performance standards. *Id.*, at 20.

account their year-to-year progress as well as "demographic, economic, and other factors that have been shown to affect student performance."[162]

North Carolina moved beyond the experimentation phase in 1995 by enacting legislation known as the ABC's of Education Act.[163] The ABC's made mandatory and statewide the previously voluntary program of local school improvement,[164] requiring annual performance goals for every school in the State in three core subjects—reading, mathematics, and writing—and providing rewards to administrators and instructional personnel in schools that could reach or exceed their expected goals. [165] The ABC's statute also outlined a procedure for identifying "low-performing" schools, and providing state assistance teams to investigate the causes of schools' low academic performance, recommend changes, and work with local school personnel. The ABC's place principals and/or teachers in low-performing at risk of forfeiting their jobs if improvements were not forthcoming.[166]

In 1997, North Carolina took up the challenge of improving teacher quality. In a series of statutes, it increased the substantive standards both for initial teacher certification and continuing certification, while modifying procedures for teacher dismissal.[167] The 1997 law also made provision for administering a "general knowledge" test to teachers in low-performing schools assigned an assistance team, to weed out the unqualified or incompetent teacher. Teacher objections eventually prompted the legislature to modify the re-testing requirement for those teachers in low-performing

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[162] *Id.*, §6, *codified at* §115C-12 (9) c1.
[163] Session Laws of 1995, Ch. 716.
[164] *Id.*, §3, *codified at* §115C-105.21.(a).
[165] *Id.*, §3, *codified at* §115C-105.28 & .29.
[166] *Id.*, §3, *codified at* §115C-105.28-.32.

schools who had previously taken and passed general knowledge or other entry-level tests.[168] Finally, the 1997 statute provided $1500 annual bonuses to all teachers in schools that achieved higher than expected growth under the ABC's program, and $750 bonuses to all teachers in schools that achieved at least expected growth goals.[169]

In prescribing target student outcomes on North Carolina's end-of-year tests (for grades three through eight) and its end-of-course tests (for high school courses), the State Board developed a four-fold classification system for all reading and mathematics test results, Levels I through IV. Under the Board's system, Level III represents student achievement at a "proficient" level.[170] Only students who score Level III or Level IV count toward the school's annual growth goals, and students who do not score at least Level III on their 3rd, 5th and 8th grade EOG tests stand at risk of non-promotion to the next grade.[171]

Every school in North Carolina receives an annual rating under the ABC's statute. Unlike states that hold every school to the same standard (for example, requiring at least 50% or 60% of all children to meet Level III performance goals), North Carolina employs a complex multiple regression formula to set specific composite growth goals for each school. In general, the formula weighs prior performance by students in each school, along with other demographic factors, such as socioeconomic status and race, and

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[167] Session Laws of 1997, §13, *codified as* §115C-325. *See generally*, Tom Stern & Ann McColl, *The Road to the Excellent Schools Act*, 10 **Education Law** 1-4 (North Carolina Bar Association, Education Law Section, December, 1997).

[168] Session Laws of 1997,§3, *codified as* §115C-105.38A.

[169] *Id.*, §20(a).

[170] 16 **N. C. Admin. Code** §6D.0501. Level IV represents achievement at and "advanced" level, while Level II represents achievement at a "basic" level, and Level I

[171] *Id.*, §6D.0304 (defining the percent of students in a school who are at or above grade level as the percent who are at Level III or IV in each content area); *id.*, 6D.0502 (requiring student achievement on reading and mathematics test at Level III to pass through the 3rd, 5th, and 8th grade "gateways"). North Carolina's writing tests are graded on a different scale, and 2.5 proficiency level is required.

sets an individual goal for each school.[172] (Under the federal Leave No Child Beyond statute, North Carolina will apparently be required to develop and employ a single uniform standard for measuring growth in its schools, to be dubbed the "measure of adequate yearly progress" or AYP).[173]

North Carolina schools are annually grouped into one of four classifications, dependent upon whether they have exceeded State-established goals, met those goals,

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[172] See **N.C. Gen. Stat.** §115C-105.29; 16 **N.C. Admin. Code** §6G.0305. Professors Clotfelter and Ladd have compared North Carolina's school-level accountability measurement approach with seven other possible approaches, and found that North Carolina's measurements seem less predetermined by the demographic characteristics of the students who attend the schools than some other approaches, although "most of the adjusted measures show some bias in the direction of more affluent and whiter schools." Charles T. Clotfelter & Helen F. Ladd, *Recognizing and Rewarding Success*, *supra* note XXX, at 38-39 & tbls. 2-1, 2-2 & 2-3.

[173] North Carolina State Bd. of Educ., *No Child Left Behind: Summary of Key Provisions*, 2. http://www.ncpublicschools.org/esea/summary.html. To satisfy the federal statute, any state accepting federal Title I money must define a single standard for "adequate yearly progress" ("AYP") for *all* of its schools statewide, not merely those receiving Title I funds, which cannot take into account the socioeconomic or prior educational status of different student population mixes in different schools. *See* Rod Paige, *Dear Colleague Letter to education officials regarding implementation of "No Child Left Behind,"* July 24, 2002. *See* http://www.ed.gov/News/Letters/020724.html. Therefore, in addition to, or in place of, its current system, North Carolina must implement a single, statewide set of measures not tailored to the particular circumstances of different schools or student populations. *Id.*

The North Carolina State Board of Education has responded by recently voting to recommend that the State continue pursuit of its own ABC's goals, and continue to award the financial incentives to teachers and staff who meet those state goals, while simultaneously developing federally-required AYP standards and goals for North Carolina schools, and offering additional financial incentives for those teachers and staff who attain the federal goals. *See* North Carolina State Bd. of Educ., *SBE Highlights*, June 5-6, 2002. http://www.ncpublicschools.org/sbehighlights/june02highlights.html. Under that proposal, faculty members would receive $600 annually if their schools met the State's "expected growth" goals, an *additional* $600 if their schools met the State's higher, "exemplary growth" goals, and an *additional* $600 if the school also met the federal "adequate yearly progress" or AYP standards—a total of $1800 in potential annual bonus payments for certified staff members in every North Carolina school. *Id.*

One recent analysis, conducted by the North Carolina Department of Public Instruction to assess the likely impact of the federal statute on North Carolina schools, concluded that 75% of North Carolina schools would have failed, in 2000-01, to achieve adequate yearly progress under federal standards. Letter from Phil Kirk, Chairman of the North Carolina State Board of Education, and Mike Ward, Superintendent of the North Carolina Department of Public Instruction, to the Honorable Howard Manning, Jr. 11 (July 29, 2002) (on file in Hoke County Bd. of Educ. v. State, *supra*; also available at: http://www.ncpublicschools.org/news/01-02/Mike-Phil_resp.pdf).

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failed to meet them, or seriously underperformed.[174] The State intends that public announcement of these school labels to drive schools toward successively higher levels of student performance. These annual performance measures have far more than intangible significance for teachers and administrators; as noted, they are directly tied to the cash bonuses offered teachers and staff.[175]

Apart from incentives based upon professional pride, these labels also are designed to mobilize pressure on teachers and administrators from parents, who can learn from the annual ABC's scores just how much their children's schools are improving. For "low-performing" schools, the impetus toward improvement can come not only from

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[174] Those that meet their projected goals (that is, in which the percentage of students achieving at Level III or above coincides with DPI growth projections) receive an "expected growth" label. Schools in which a higher percentage of students than projected achieve a Level III or above performance receive an "exemplary growth" label. Schools that fail to meet their projected growth *and also* have significantly fewer than 50% of their students performing at Level III or above are labeled "low-performing." Schools that fail to meet their projected goals, but in which at least 50% of all students achieve at Level III or above receive no recognition.

[175] All teacher and other certified personnel in schools that receive an "exemplary" designation receive a $1500 bonus, while teachers' assistants receive a $500 bonus. In schools that achieve expected growth, the bonuses are halved, to $750 and $250 respectively. No bonuses are awarded if schools perform below "expected" levels. Several features of this bonus system have drawn the disapproval of some. Since only three subjects are tested in grades three through eight, the bonuses of *all* teachers and other school personnel depend directly upon the performance of only a portion of the instructional staff. Other teachers lament that the high-stakes focus on the end-of-grade tests constrains their freedom in teaching. Whether the accountability movement is impoverishing the breadth of the elementary and secondary curriculum is one of the important empirical questions that deserves greater attention from educational researchers.

The ABC's may unintentionally affect the operation of schools, especially those that serve third through eighth graders, in ways that have prompted concern from some critics. Since these school's annual designation and the bonuses of school personnel depend exclusively on student performance in only three subjects—reading, mathematics, and writing--some fear that principals will be sorely tempted to trim resources, instructional personnel, and attention devoted to other subjects, such as science, social studies, geography, art, music, and health in favor of all-but-exclusive focus on the three tests subjects. The State plainly does not intend to abandon these other important parts of the curriculum; yet if the accountability view of human motivation is correct, curricula subjects that are measured and rewarded that will likely receive the most attention

This concern is less serious at the high school level, of course, since end-of-course tests cover a broader range of subjects, including algebra I, biology, economic, legal and political systems (ELPS), English I and II, and United States history. 16 **N.C. Admin. Code** §6G.0310(4). Nonetheless, even at the

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concerned parents but , as noted above, but from official "assistance teams," dispatched by the State Board to low-performing schools with broad authority to investigate and review all facets of school operations, evaluate teachers and other school personnel, collaborate to design a school improvement plan, and if the school ultimately fails to improve, to recommend to the State Board that it dismiss the principal or replace the superintendent (if more than half the schools in the district are low-performing or if the superintendent fails to cooperate with the assistance team).[176] Under circumstances where the local school board itself fails to cooperate, the State Board may suspend its authority and to administer schools in the district directly.[177]

C. The Likely Impact of Accountability in a Resegregating School System

1. The Impact on Students

Beginning with fifth graders in the 2000-2001 academic year and expanding to third and eighth graders in 2002, students' performances on EOG tests in the third grade, the fifth grade, and the eighth grade now bear directly on their promotion to a higher grade at the end of the school year. As part of its commitment to accountability, North Carolina has decreed an elimination of "social promotion," the practice of passing along students who have not mastered the material in one grade to a higher grade. The new EOG test scores play a major role in three new "gateways" at the third grade (gateway 1) , fifth grade (gateway 2), and eighth grade (gateway 3) levels, determining whether

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high school level, higher mathematics, and sciences other than biology, as well as the arts and music, play no current role in determining a high school's "performance composite."

[176] **N.C. Gen. Stat.** §115C-105.30 –32; *id.*, §115C-325

[177] *Id.*,.§115C-39 (b).

thousands of North Carolina children each year are promoted.[178] Moreover, high school students will soon be required to pass a battery of tests, first administered in the tenth grade, before they are permitted to receive a North Carolina high school diploma.[179]

As indicated, the new EOG tests have a significant role in decisions concerning student promotion or retention. Regulations adopted by the North Carolina State Board initially implied that performance at Level III on both the reading and mathematics tests would be a prerequisite for promotion to the fourth, sixth, and ninth grades, even if a student has attained passing grades on all other regular school work and examinations.[180]

The actual reality is a bit more complex, since the State Board has elaborated a whole series of retests and "focused interventions," such as after-school drilling or summer school, to assist students who initially fail the EOGs, and it mandated a more formal, semi-adversary procedure for parents unhappy with a child's retention. The General Assembly turned many of these protections into positive law in 2001, thereby

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[178] There are serious questions about whether North Carolina's use of its EOG tests in making student promotion decisions is an appropriate use of the tests, which were initially designed, not for making individual student determinations, but for assessing schools' overall effectiveness in teaching basic curricular subjects. *See* **Making Money Matter**, *supra* note XXX, at 181 (raising questions about the validity of North Carolina's use of its school-wide accountability tests for making student promotion decisions); *see also* .

[179] North Carolina Board of Education, *"Testing Started with the ABC's" and Other Myths About Testing and Accountability in North Carolina*, 3 (http://www.ncpublicschools.org/parents/myths.html). These "exit tests" will differ from, and be administered in addition to, the end-of-course tests already administered in high school courses, and they will serve as the exclusive gateways to a high school diploma. The exits examinations will test students through four, two-hour examinations that will cover: English, reading and grammar; mathematics (through Algebra I): science (including biology); and social studies (including United States history and economics/legal/and political systems).

[180] The North Carolina Administrative Code provides : " In addition to meeting local promotional requirements, students in grade 3 shall demonstrate proficiency by having test scores at level III or above on end-of-grade tests in both reading and mathematics. Students who score at Level III or above and who meet all local promotion requirements shall be promoted to grade 4 unless the school principal shall determine otherwise in consultation with teacher(s). These requirements shall become effective with the 2001-02 school year."16 **N.C. Admin. Code** §6D.0502 (a).

enlarging the protections for unhappy parents and their children.[181] Moreover, although decisions on promotion traditionally rests with each school principal under North Carolina law,[182] and earlier versions of the ABC's required all principals to report to the State Board their decisions to promote any child who has failed a gateway EOG test,[183] the General Assembly moved in 2001 to soften the more austere demand for successful passage of the EOG tests, by forbidding principals to decide against promotion based upon the EOG results alone, but instead affirmatively requiring the principal to consider classroom work, grades, and the best interests of the child, before making the promotion decision.[184]

In North Carolina, the non-promotion rate has increased in each of the three gateway grades during the 1990s, though the increased percentage figures during the 1990s are relatively small, and the overall percentages are relatively small as well.[185]

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[181] Parents have a right to appeal a principal's decision to the local school board. *See* An Act to Clarify the Right to Appeal to a Local Board of Education and to Require Notice of the Dismissal, Demotion, or Suspension Without Pay of Noncertified Employees, 2001 **N.C. Adv. Legis. Serv.** No. 260. §1.1. Additional, boards are required to adopt policies that include opportunities for parents and guardians to discuss decisions to retain students. Current Operations and Capital Improvements Act of 2001, 2001 **N.C. Adv. Legis. Serv.** No. 424 §28.17.

[182] **N.C. Gen. Stat.** § 115C-288(a) (1999).

[183] 16 **N.C. Admin. Code** § 6D.0505 (2002).

[184] *See* **N.C. Gen. Stat.** § 115C-288(a) (2001). The amendment added the following qualification to the more general power to "grade and classify pupils": "In determining the appropriate grade for a pupil who is already attending a public school, the principal shall consider the pupil's classroom work and grades, the pupil's scores on standardized tests, and the best educational interests of the pupil. *The principal shall not make the decision solely on the basis of standardized test scores.*" 2001 **N.C. Sess. Laws** 424 § 28.17 (b). (emphasis added); *see* Laurie L. Mesibov, *Changes Affecting Elementary and Secondary Education*, **Sch. L. Bull.** 1 (Fall, 2001) (discussing these changes).

[185] **Non-Promotion Rate (%) By Grade**

YEAR	3d Grade	5th Grade	8th Grade	9th Grade
1989-90	2.0	0.8	2.2	10.4
1991-92	1.5	0.6	1.9	11.3
1993-94	1.9	0.7	2.1	10.0
1995-96	2.1	0.8	2.3	15.7
1998-99	2.9	1.1	2.4	16.6

North Carolina Public Schools Statistical Profile 2000, at 10, tbl 6.

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In 1998-99, the number of students not promoted included 3,069 from the third grade, 1,102 from the fifth grade, and 2,275 from the eighth grade. Hence, only 6,446 students were retained in 1998-99 prior to the institution of the new EOG gateway process.

During 2000-2001, the first year of effective high-stakes testing for North Carolina fifth graders, the new standards were not rigorously enforced, in part because of acknowledged problems with the mathematics test. In fact, only two percent of the state's 105,830 fifth graders were actually retained; 5,406 were promoted despite failing one or more of their EOG test grades.[186] Results from 2001-02 are not reported as of the date of this paper's submission; they will be released in the fall of 2002, after North Carolina summer schools have worked to improve the performances of some students who initially failed their EOGs during the spring of 2002.

Nonetheless, the experience of other states that have adopted high-stakes testing is that the percentages and numbers of nonpromoted students will rise, at least during the first years of the new system. The State Board of Education acknowledges as much, though its expressed view is relatively sanguine.[187] Under the State Board's assumptions, overall retentions will likely increase from 6,446 to 20,837 (or 323 percent), once all

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[186] **North Carolina State Bd. of Educ., A Report on The Impact of State Accountability Standards for Grade 5, 2000-2001** 9, tbl. 3 (Oct. 31, 2001); *see also* Todd Silberman, *Promotion crackdown falls short*, **News & Observer**, Oct. 4, 2001, at A3.

[187] One recent state publication included the following question and answer:

[Q]: Will there be thousands of students retained the first year the new standards are put in place?

[A]: Local officials have been encouraged to begin immediate intervention with students who are not at grade level to ensure that they will meet the new standards when they go into effect in the 2000-2001 school years. Also, those systems that have implemented student accountability standards [the Johnston County, Lenoir, and Transylvania districts have already instituted "no school promotions" policies tied to student performance on EOG tests] reported that large numbers of students were not retained. Generally, educators expect that the percentage of students likely to be retained would increase from 3- to 5 percentage points over current levels. For the 3rd grade, 2.9 percent o[r] 2,982 students were retained in 1997-998. New standards are expected to increase that to as many as 8,124 retentions at 3rd grade. For the 5th grade, only 1.2 percent or 1,153 students were retained in 1997-98. This figure could be as high as 5,955, or 6.2 percent. For the 8th grade, 2.4 percent or 2,192 students were retained in 1997-98. That is

three gateways are in operation in 2002-2003.[188] Yet these non-promotion figures seem relatively optimistic. In 1999-2000, according to the State's own figures, only 79.1 percent of the State's fifth graders performed at Level III or above on EOG reading tests, while only 82.9 percent performed at Level III or above on their mathematics tests. Among African American students, the figures were 63.7 percent and 69.5 percent, respectively.[189]

To put it more pointedly, in 1999-2000, approximately 20 percent of all fifth graders, and 35 percent of all African American fifth graders, failed to achieve Level III on one of those two tests. Since every student must pass *both* of the tests to avoid a risk of non promotion, the 1999-2000 results suggest that the percentage of fifth graders who might fail *either* reading *or* mathematics—and thus be at risk of nonpromotion—is far higher than the overall 20 percent figure from 1999-2000, and the 35 percent figure among African American students. Using the State's projected "final average daily membership" figures, that would mean more than 20% of North Carolina's 105,078 fifth graders alone, or 21,015 souls, would likely to face the unhappy prospect of failing the new "high-stakes" version of the ABCs.[190]

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expected to rise to 6,758, or 7.4 percent. North Carolina State Board of Education, *Student Accountability Standards: Frequently Asked Questions*, 8 (http://www.ncpublicschools.org/student_promotion/faq.html).

[188] *See* North Carolina State Board of Education, *Student Accountability Standards: Frequently Asked Questions*, 8 (http://www.ncpublicschools.org./students_promotion/faq.html).

[189] North Carolina State Board of Education, *A Report Card for the ABCs of Public Education, Vol. II 1999-2000, End-of-Grade Subgroup Statistics by School, Summary* (http://www.ncpublicschools.org/accountability/reporting/00reportcard/eog.pdf)

[190] *North Carolina Public Schools Statistical Profile 2000*, at 13, tbl 9. These projections do *not* include the potential effects of retesting or focused intervention, which might substantially reduce the overall numbers and percentages of students who would be retained. [get 2001-2002 results]

A special commission charged with examining North Carolina's "achievement gap" confirmed these black/white disparities in EOG performance in a December, 2001 report to North Carolina's State Board of Education:

> We can no longer afford to avoid the discomfort often associated with recognizing that ethnic culture (race) is somehow associated with [academic] failure. The evidence is compelling. In every analysis of EOG test data from the ABCs program presented to the Commission over the past year, the factor of race was dominant in differentiating levels of achievement. . . .
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> . . .
>
> The most pronounced differential exists between the white student group with 82 percent achieving at or above grade level on the 2000-2001 EOG testing, while only 52 percent of African-American students were at or above grade level. Hispanic and American Indian students scored above blacks but considerably below whites and Asians.[191]

While statewide, the overall gap between white and black student performance is high, as in many other states,[192] there is some evidence that it is especially large in those schools that are more segregated. For example, among the five urban districts identified by Clotfelter, Ladd, & Vigdor, the black/white gaps on both reading and mathematics are higher in the three "rapidly resegregating" districts—Charlotte/Mecklenburg, Guilford, and Winston-Salem/Forsyth—than in the two "more racially integrated" districts, Cumberland and Wake. The following reports provides composite percentages for

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[191] **Dr. Robert E. Bridges, The North Carolina Commission on Raising Achievement and Closing Gaps: First Report to the State Board of Education** 4, 21 & exh. 2 (December 2001) (showing 82.0 of white all students in grades 3-8, 78.6 percent of Asians, 60.0 of American Indians, 58.7 percent of Hispanics, but only 52.0 of blacks scoring at or above Level III on *both* State reading and mathematics tests in 2000-01) (bolding in original). *See also* **North Carolina State Board of Education & Department of Public Instruction, North Carolina State Testing Results, 2000-01** 53-54, 65, 68, 72(April, 2002) (providing detailed statistics on students passage rates on state EOG tests at the third-, fifth-, and eighth-grade levels, disaggregated by race and ethnicity, that show similarly wide disparities at each grade level).

[192] *See generally,* Larry V. Hedges & Amy Nowell, *Black-White Test Score Convergence since 1965, in* **Jencks & Phillips, The Black-White Test Score Gap**, *supra* note XXX, at 149-81 (reporting on "every major national survey of high school students since 1965 that has tested both blacks and whites," *id.* at 167, and finding substantial, but diminishing differences in performance nationwide).

African American students scoring at or above Level III proficiency on North Carolina's 1999 EOG exams :

	Reading	**Math**
Charlotte/Mecklenburg	51.6	54.7
Forsyth/Winston-Salem	56.7	59.4
Guilford	57.9	59.3
* * * * * * * *		
Cumberland	65.6	66.9
Wake	60.8	62.3[193]

Of course, it is possible these variations stem from other characteristics of these districts, such as differences in the average socioeconomic status of their students, their levels of school funding, or their teacher characteristics. However, a review of the data do not vindicate any of these alternatives explanations. In 1999-2000, all of the three large districts with lower-performing students ranked among the state's top 16 (of 117 districts) in total spending per average daily membership (a conventional measure of students in attendance), while Cumberland, in which student performance is substantially higher, ranked only 46th in spending:

	Current Spending Per ADM	Capitial Spending Per ADM	Total Spending Per ADM
Charlotte/Mecklenburg	$2,073	$1,292	$3,365 (3d)*
Forsyth/Winston-Salem	$1,667	$ 674	$2,341 (11th)
Guilford	$1,685	$ 456	$2,141 (16th)
* * * * * * * * * *			
Cumberland	$1,007	$ 445	$1,452 (46th)
Wake	$1,528	$1,464	$2,994 (5th)[194]

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[193] **The North Carolina Justice & Community Development Center, Exposing the Gap: Why Minority Students Are Being Left Behind in North Carolina's Educational System** 24-25 (January 2000)

Moreover, these high rates of average failure are not evenly distributed among all elementary schools within these five districts. Instead, as we might expect based upon earlier evidence about the increasing racial segregation within these districts, the disproportionate poverty of their students, and the consequential adverse impact of "high poverty" school attendance on student performance.[195]

In sum, it is likely that the numbers and percentages of students who are not promoted under the ABC's of education will rise substantially, especially in schools with higher percentages of African American and Hispanic children, and in schools with higher percentages of poor children. In school districts where schools are resegregating by race and socioeconomic class, these "failing schools" may either soon house especially large percentages of children who are being retained in grade, with all of the increased risks for dropping out that researchers have identified,[196] or alternatively, these schools will effectively abandon any real commitment to end social promotion simply in order to keep their student cohorts moving through the system.

These trends obviously present grave educational challenges. Perhaps the greatest virtue of accountability systems is their capacity to identify districts, schools, and to be sure, North Carolina's ABC's system will accomplish the task of identifying the districts and schools that have failed to educate their students. (Moreover, since the federal No

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[194] **Public School Forum of North Carolina, 2001 North Carolina Local School Finance Study** 7, tbl. 2, *Actual Effort* (Dec. 2001).

[195] *See* text at note XXX, *supra* (discussing the relationship between race, low-income status, and state EOG scores in Forsyth County).

[196] *See generally,* **High Stakes**, *supra* note XXX, at 128-133 (summarizing previous studies, and concluding that "simply repeating a grade does not generally improve achievement; moreover, it increases the dropout rate")(citations omitted). One study cited in **High Stakes** reported that "the presence of high-stake 8th grade tests is associated with sharply higher dropout rates, especially for students at schools serving mainly low-SES students." *Id.* at 130 (citing Sean F. Reardon, *Eighth Grade Minimum Competency Testing and Early High School Dropout Patterns.*(unpublished paper presented at the annual meeting of the American Educational Research Ass'n, New York, April, 1996)). *See also*

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Child Left Behind statute will require all schools to disaggregate their scores by race, ethnicity, limited-English proficiency, and family income status, even districts and schools that have overall high levels of student performance will no longer be able to ignore major cohorts of their student populations.) These are substantial pluses of the accountability system.

Yet once that identification process has been completed, the major work lies ahead, not behind. North Carolina's resegregating and high poverty schools must be assured of receiving the human and fiscal resources they need—enough certified teachers to staff every classroom, smaller classes especially in the earlier grades, experienced principals and staffers, sufficient funds for professional development, resources to support meaningful tutoring, after-school, English proficiency, special education, and other tailored programs—in sum, resources to match those of schools in more affluent areas. Even if thus provisioned, we have examined a very substantial body of empirical evidence questioning whether high-poverty schools can overcome, merely through these additional resources, the severe effects of poverty concentration.

Moreover, as we shall see in the following section, any confident assumptions that adequate resources *will be provided* to each needy school and child throughout North Carolina may be premature. [197] Despite the shining promises of the State's constitution, despite the farsightedness and determination of its state judiciary in the *Leandro/Hoke* school finance litigation, and despite the manifest good will of North Carolina's educational leadership, any shortfall of resources could quickly swamp thousands of struggling low-income and minority children in North Carolina. For as the American Educational Research Association has cautioned:

> [I]f high-stakes testing programs are implemented in circumstances where educational resources are inadequate . . . there is potential for serious harm. Policy makers and the public may be misled . . . students may be placed at increased risk of educational failure and dropping out; [and] teachers may be blamed or punished for inequitable resources over which they have no control.[198]

2. The Impact on Parents

One primary purpose of identifying high-performing and low-performing schools under an accountability system, as we have noted, is to identify schools that are falling short, so that the State can take necessary steps to improve them, thereby allowing every child to attain high academic goals.[199] However, identifying schools that fall short in academic performance opens another possible avenue for impatient parents: to move to schools where other students are already achieving at high levels. Scholars have long noted this classic "exit" pattern of response.[200]

North Carolina's developing patterns of school assignment lend themselves to exercise of this choice in at least two ways. For districts that opt for neighborhood schooling, parental choice can take the form of selecting the "right neighborhood" for residence—ones in which public schools are high-performing (and the racial mix is to the

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[197] *See* discussion at pages XXX-XXX *infra*.

[198] **American Educational Research Ass'n, AERA Position Statement Concerning High-Stakes Testing in PreK-12 Education** 1-2 (July, 2000).

[199] The National Research Council has observed that testing can have at least seven discrete functions: (1) to aid in instructional decisions about individual students; (2) to provide information about the status of the educational system; (3) to serve as a motivation for change or improvement; (4) to assess the effectiveness of particular educational programs; (5) to hold schools and educators accountable for student performance; (6) to act as a lever to change classroom performance; and (7) to certify students as having attained specific levels of mastery. **High Stakes**, *supra* note XXX, at 33-37. To the extent that North Carolina's ABCs serve purposes 2, 3, 4, 5, or 6, they can prompt meaningful educational changes without necessarily threatening students who find themselves within a deficient system.

[200] *See generally* **Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States** (1970); James S. Liebman, *Voice, Not Choice*, 101 **Yale L.J.** 259 (1991) (evaluating the dangers to public education, especially for at-risk children, of allowing parents greater choice in the selection of their children's schools).

parents' preference).[201] A large body of empirical literature fortifies what most of us know from common observation: entry into neighborhoods with more desirable public schools is usually more expensive, since home prices reflect the "premium" derived from the better-performing schools to which the neighborhood children will be assigned. Such neighborhoods, moreover, participate in a housing/education feedback system: their economic exclusivity augments, over time, the collective educational achievement of students in their schools (since students in those schools will be drawn from families with higher socioeconomic backgrounds, and will predictably perform better, on average, on academic testing). The contrary tendency will also manifest itself; poorer families find themselves relegated to less expensive housing in secondary or overcrowded neighborhoods within a school district, or to poorer districts. Their public schools run the risk of becoming "high poverty" schools so long as assignments are bounded by local neighborhoods.[202]

What school accountability, with annual test scores, adds to this general tendency of neighborhood stratification is its aura of concrete "certainty" and its annual information about school performance trends. While neighborhood ambiance or the economic profiles of a community may be more intangible, comparative public school performances are now available, on the Web, accurate to the tenth of a decimal place. Doubtless realtors throughout Charlotte , Greensboro, and Winston-Salem have

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[201] *See* Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 **Harv. Educ. Rev.** 177 (2002) (examining this dynamic relationship).
[202] *See generally* john a. powell, *Living and Learning: Linking Housing and Education*, 80 **Minn. L. Rev.** 749 (1996) (exploring the crucial links between housing and school segregation and integration); Nancy Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 **Minn. L. Rev.** 795 (1996) (same).

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committed to memory the ABC reading and mathematics scores for elementary and secondary schools within their area.[203]

Even in districts operating under "schools of choice" or other open school assignments plans that allow parents to choose their children's' schools unconstrained by their neighborhood of residence, as Professor Liebman once speculated in another context, "the educationally oriented parents and children ("call them 'educational connoisseurs') . . . [will] demand and receive higher quality educational services than . . . consumers with less exacting educational tastes."[204] Indeed, that lack of relative educational sophistication among lower income parents may explain one recent surprise under a provision of the federal No Child Left Behind Act which empowers parents whose children attend any schools that have failed to make adequate yearly progress for two years in a row to transfer their children to other, higher-performing schools within the district.[205] Although the Act has immediate applicability (drawing upon schools' scores on whatever statewide accountability tests various states have employed previously) and although parents in 8,652 schools nationwide are immediately eligible to

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[203] *See* http://www.ncreportcards.org (providing a district-by-district, school-by-school information). This author received a friendly, colorful brochure from a Chapel Hill realtor during the summer of 2002, providing State EOG scores, accurate to the decimal place, for every elementary, middle, and high school within the Chapel Hill school district, and offering to help parents choose residential locations that would assure their children assignments to particular schools.

[204] Liebman, *Voice, Not Choice*, *supra* note XXX, at 261 (suggesting why any apparently positive educational impact of private school education might be misleading, since educationally oriented parents might choose private education in disproportionate numbers). *See also* Amy Stuart Wells & Jennifer Jellison Holme, *The Effect of the Standards and Accountability Movement on Parents* (exploring parental responses to accountability systems).

[205] No Child Left Behind Act, *supra* note XXX, 20 U.S.C.§ 6316 (b)(1) (E) provides, in pertinent part: "In the case of a school identified for school improvement [because it has failed, for two consecutive years, to make adequate yearly progress] . . the local educational agency shall . . .provide all students enrolled in the school with the option to transfer to another public school . . that has not been identified for school improvement." *See generally*, William L. Taylor.

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demand reassignment,[206] apparently only "a trickle" of parents will be exercising their new option in the fall of 2002.[207]

Some might reason that since North Carolina's accountability system sets different goals for each school annually—adjusted school-by-school to reflect the demography of the school's children—even high-poverty schools can please inquiring parents by earning exemplary or "meeting expectations" rankings (even if their absolute scores will be lower than those in another school with a different racial and SES mix).[208] Yet the new federal No Child Left Behind statute will require the abandonment of precisely this feature of North Carolina's accountability system. Instead, the new federal law will require the designation of an unadjusted, annual standard by which all schools in every district will be measured.[209] Although some argue that this universal goal is important to assure high performance by all schools and children,[210] Professor Ladd has observed that such a standard does not actually measure the incremental progress each school manages to accomplish in a given year, and thus "the use of average unadjusted test scores as the ranking measure w[ill] disproportionately favor schools with above-average proportions of whites and below-average proportions of poor students," even if teachers and principals in lower-performing schools are actually making great yearly strides (though with a student population that starts the academic year further behind

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[206] Lynn Olson & Erik W. Robelen, *Frustration Grows as States Await 'Adequate Yearly Progress' Advice*, 42 **Educ. Week** 1, 41 (July 10, 2002) (providing a state-by-state count of schools in which parents will have such choices).

[207] Erik W. Robelen, *Few Choosing Public School Choice for This Fall*, 70 **Educ. Week** 1 (Aug. 7, 2002).

[208]

[209] *See* Pub. L. No. 107-110, 115 Stat. 1425, 20 **U.S.C.** § 6311 (b)(1)(A) & (B). (requiring that states adopt "the same academic standards" for "all schools and children in the State").

[210]

students from more affluent schools).[211] In addition, it is unclear whether parents, especially more affluent parents, will be satisfied knowing how much progress their children's school may have made, if the bottom line results find their school lagging substantially behind others in their district.

3. The Impact on Teachers and Administrators

As we have seen, to spur teachers to improve the academic performance of their students, the accountability system offers direct financial incentives, more indirect professional rewards, and the fear of professional failure. The logic, drawn from the world of business, is that teachers can be induced to maximize their professional activity if suitably motivated. The crucial assumption is that most teachers lack the will to excel, rather than the capacity or the means. Very few studies of teacher motivation and competence, however, confirm that key assumption. On the contrary, teachers generally appear to be relatively idealistic and highly motivated, even if some lack professional competence in dealing with low-performing children or those from minority or low-income backgrounds.[212]

Moreover, even as there are two basic strategies for parents who seek higher performance for their children, so are there two strategies for most teachers. The first is to redouble efforts at whatever school they find themselves, hoping thereby to improve the

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[211] Helen F. Ladd, *Introduction in* **Holding Schools Accountable: Performance-Based Reform in Education** 13 (Helen F. Ladd ed. 1996); *see also* Charles T. Clotfelter & Helen F. Ladd, *Recognizing and Rewarding Success in Public Schools, in* **Holding Schools Accountable,** *supra* 56 (concluding that it is unfair not to adjust scores based upon factors outside schools' control that influence student test scores, such as students' socioeconomic status).

[212] North Carolina's Bridges Commission noted this problem and recommended that "the state provide the substantial TIME that classroom teachers need to update their skills and gain new skills in working with diverse populations." **Bridges Comm'n, First Report**, *supra* note XXX, at 13 (capitals in original, boldface omitted); *cf.* Thompson, **Research-Based Review**, *supra* note XXX, at 13-14 (cautioning against too much emphasis on "culturally responsive education," and suggesting that research shows what teachers of low-income and minority students need most is additional instruction on academic content).

performance of their young charges. The second, however, is to move to a school in which the overall performance of students is already higher, so that the teacher can take credit, inferentially, for their students' more successful learning patterns. The structure of North Carolina's accountability system makes the second option especially attractive to elementary teachers who do *not* specialize in either reading or mathematics, since their financial bonuses depend, not upon their own efforts, but for those of reading and mathematics teachers over whom they have no direct control. Of course, moving to another, more successful school normally requires either greater seniority or superior skills, so that it is the more experienced and able teachers who will normally have the mobility to move to higher-performing schools.[213]

Recent research findings document that this pattern of movement is exactly what is underway in many states. Professors Scafidi and his colleagues have documented in Georgia what Professors Kain and Singleton have likewise shown in a study of over 1.8 million children and 4,500 elementary schools in Texas:[214] that "teachers employed in schools with high fractions of disadvantaged minority students have lower ability (as measured by verbal and written test scores on a state teachers' exam), fewer years of education, less experience, and more students in their classes than do teachers in schools with larger percentages of high-income and white students."[215]

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[213] **Making Money Matter**, *supra* note XXX, at 169 (observing that "[w]ealthy districts with high salaries and desirable working conditions rarely experience shortages in any field, whereas district and schools with large numbers of low-income and minority students are much more likely to face difficulty recruiting qualified teachers and to hire unqualified teachers or to use substitute teachers to fill positions," *citing* **Linda Darling-Hammond, Doing What Matters Most: Investing in Quality Teaching** (1997)).

[214] John F. Kain & Karl Singleton, *Equality of educational opportunity revisited*, **New Eng. Econ. Rev.** 87 (May/June 1996).

[215] **Making Money Matter**, *supra* note XXX, at 211; *see also* David Sjoquist, Benjamin Scafidi, & Catherine Freeman, *Teacher Characteristics and Racial Composition of Schools in Georgia.*

One recent analysis of elementary school teachers in four school districts in North Carolina's Research Triangle area reached a similar conclusion about relative teacher quality. Drawing upon State records, the report found that "[s]chools in the Triangle with high numbers of poor children have the least qualified teachers and experience that highest rates of turnover." The report contrasted one Durham elementary school where 82 percent of the children receive subsidized school lunches with another where only 11 percent receive the lunches. In the high-poverty school, "fewer than two-thirds of the teachers were fully licensed, 44 percent had less than three years of experience, and the turnover rate was 52 percent." In the low-poverty school, by contrast, "93 percent of the teachers were fully licensed, more than half had 10 years of experience, and [only]18 percent had less than three years of experience." More than 90 per cent of students in the low-poverty school passed state EOG exams; the passage rate at the high-poverty school was 53.5%.[216] The Johnston County school superintendent acknowledged that "finding teachers to work in schools with a large population of low-income students is difficult. 'Teachers don't want to work in those schools,' [superintendent] Causby said, thought he added that there are exceptions."[217]

Superintendent Causby's observations about teacher preferences coincide with anecdotal information from the National Research Council that standard-based reform "may be making schools that are identified as low performing less attractive to teachers."[218] Professor Ladd has found concern, especially among principals in North

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[216] T. Keung Hui, *Teacher picture is grim*, **News & Observer**, July 2, 2002, at A1 and A8 (offering 2001-2002 data on poverty rates, student passage rates, and rates of full teacher licensure, advanced degrees, and teacher board certification for every elementary school in the Wake, Johnston, Chapel Hill-Carrboro, and Durham school districts).
[217] *Id.* at A8.
[218] **Making Money Matter**, *supra* note XXX, at 272.

Carolina who serve low-performing schools, both that the state's accountability program may create incentives that will better performing teachers toward middle-class, white schools, while leaving them with few effective means to remove poor teachers already present in their low-performing schools.[219]

Some argue that teacher flight from poorly performing schools will not be accelerated by accountability programs, since the new federal No Child Left Behind Act requires *all s*chools to disaggregate their test data and thereby reveal average performance among various subcategories of students—grouped by economic disadvantage, race, ethnicity, disability, and limited English proficiency.[220] Moreover, unless each subgroup meets its yearly targets, teachers and other will not be deemed to have met their school's goals, even if the *overall* academic performance of all children meets or exceeds annual goals.[221]

Yet a more malign consequence of relying on disaggregated data is possible. Since professional and financial reward will flow only if all categories of students meet their performance targets,[222] principals and teachers will have not one, but at least two

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[219] **Helen F. Ladd & Arnaldo Zelli, School-Based Accountability in North Carolina: The Response of School Principals** 24-25, 27 (Terry Sanford Institute of Public Policy, Working Paper Series SAN01-13, July 2001).

[220] See Pub. L. No. 107-110, *supra*, §1111 (b)(1)(B) & (C), 115 Stat. 1446-47. *See generally* James S. Liebman and Charles F. Sabel, *Toward Desegregating Education* (exploring the positive features of accountability measures that disaggregate student performance by racial, ethnic, and other demographic characteristics).

[221] *Id.* §1111 (b) (1) (I), 115 Stat. 1448-49.

[222] In its June, 2002 meeting, North Carolina's State Board of Education approved changes to its prior system of incentive awards to teachers under the ABC's program, which incorporate the federal requirement to identify schools that make Adequate Yearly Progress. The new North Carolina incentive model will reward teachers and staff for meeting the goals of the current ABC's measures *and* for attaining the federal goals of AYP. For example, certified staff in schools meeting the state "expected growth" goals will receive $600 apiece. The staff in schools meeting the state "high growth" goals will receive an additional $600. Staff in schools meeting state high growth goals *and also* federal Adequate Yearly Progress goals will receive an additional $600 apiece, for a prospective total of $1800 in financial incentives. Teacher assistants will receive similar incentives, though in $200 increments, with a maximum incentive payment of $600. North Carolina State Bd. of Educ., *SBE Highlights*, June 5-6, 2002. http://www.ncpublicschools.org/sbehighlights/june02highlights.html.

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alternative means of achieving that end. The route obviously intended by accountability planners is for teachers and administrators to focus necessary attention and resources on students who have difficulty mastering the requisite material—special education students, African American and Hispanic students, children from economically and educationally impoverished backgrounds. The other, unintended route, however, would be for school administrators to adjust, as much as the system will allow, the pool of students over whom they have responsibility. Insofar as they are able, then, school officials may well avoid enrolling such students or resort to measures, such as expulsion or transfer to alternative schools, that remove these students from cohort for whom they have responsibility. The focus on disaggregated scores, in short, may well give principals, teachers, and perhaps superintendents (at least those in more affluent and white schools) both financial and professional incentives to place their political support behind fluid student assignment systems that depend either on neighborhood schools (that facilitate residential sorting by race and socioeconomic status) or on parental choice (that allow more educated parents to direct their children toward the "winner" schools).

Moreover, since North Carolina has recently decided to continue its state bonus incentives (albeit at slightly smaller award levels, down from $750 for attaining expected growth and $750 more for exceeding expected growth to $600 for achieving each goal) and make achievement of federal goals the basis for an additional $600 bonus,[223] teachers at higher performing schools will still be eligible for $1200 yearly if they exceed state standards, even though they might lose $600 yearly if some categories of students fail to make "adequate yearly progress" under the federally imposed standards.

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[223] *See* discussion *supra* at note XXX.

D. Conclusion: Accountability Measures May Unintentionally Exacerbate North Carolina's Drift Toward Racial Resegregated and Economically Isolated Public Schools

This paper does not argues that the accountability approach is either misguided or doomed to failure. The light it hopes to shine annually on every district, school, and student statewide could prove essential in assuring that all North Carolina children receive high-quality educations no matter where they live or what their parents' personal circumstances. What this paper does argue is that when accountability measures are imposed on, and interact with, school systems characterized by growing racial and ethnic segregation, they threaten to exacerbate the isolation of African American, Hispanic, and low-income children, with negative consequences both for their access to highly performing classmates and for the prospect of attracting better, more highly qualified classroom teachers to their schools.

Indeed, some sobering assessments of the accountability approach on racial and ethnic minorities have already come from the National Research Council, which reported in 1999 that, at that time, only two systematic studies had been completed on the effect of these systems on student achievement. The first, an examination of the Dallas, Texas program conducted by Professor Ladd, found "evidence of gains in student achievement for whites and Hispanics but not for black students."[224] The other study, an examination of Charlotte, North Carolina's five-year experience with its "Benchmark Goals Program" by Professors Smith and Mickelson, found "few or no gains from the incentive

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[224] **Making Money Matter**, *supra* note XXX, at 183, *citing* Helen F. Ladd, *The Dallas school accountability and incentive program: An evaluation of its impacts on student outcomes*, **18 Econ. of Educ. Rev.** 1 (1999).

system."[225] It is the convergence of North Carolina's increasing racial segregation with high-stakes accountability testing that, in tandem, presently is darkening the clouds on the state's educational horizon.

III

SCHOOL FINANCE/RESOURCE INEQUITIES? WHILE REFORMS ARE NECESSARY, WILL THEY PROVE EDUCATIONALLY SUFFICIENT, AND CAN POLITICAL WILL BE SUSTAINED?

Any roster of outstanding structural deficiencies in America's public schooling system in the mid-1960s would surely have cited funding inequities as second in gravity only to racial discrimination. Indeed, the very Congress that passed the momentous Civil Rights Act of 1964, outlawing many forms of racial discrimination, simultaneously commissioned a report to determine just how great were the resource disparities that had been tolerated in the nation's public schools[226] despite *Plessy v. Ferguson*'s oft-ignored promise of "separate but equal."[227] Among the more surprising findings that report was its conclusion that interregional and metropolitan-rural differences in resource allocation were even greater than racial differences.[228] The school finance reform struggles of the past thirty years—in both federal and state courthouses and in legislative assemblies throughout the land—have been fought to address these crucial challenges presented by this "fiscal storm."

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[225] **Making Money Matter**, *supra* note XXX, at 183, *citing* Stephen S. Smith & Roslyn A. Mickelson, *All that glitters is not gold: School reform in Charlotte-Mecklenburg*, __ **Educ. Eval. & Pol'y** __ (200_).

[226] *See* Civil Rights Act of 1964, Pub.L. No. 88-352, 78 Stat. 241, 247 titl. IV, § 402 (codified at 42 U.S.C. § 2000c-1(1966) (commissioning a survey to address "the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States")..

[227] 163 U.S. 537, 540 (1896) (upholding a Louisiana statute that provided for "equal but separate" railway accommodations for black and white passengers).

[228] **James S. Coleman, et al., Equality of Educational Opportunity** 12 (U.S. Dep't of HEW 1966).

While some progress has been made toward greater inter-district "fairness" or equity,[229] many Southern courts have rejected any state constitutional obligation to assure funding equality,[230] and those states North and South in which funding redress has been ordered have often found the effective redistribution of educational resources far more difficult than initially anticipated.[231] Indeed, in North Carolina, despite a school finance lawsuit initiated in 1994 and a vigorous declaration of constitutional principle by the North Carolina Supreme Court in 1997,[232] the tenth year of school finance reform

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[229] *See, e.g.*, Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 **Ga. L. Rev.** 543 (1988) (discussing the unsteady progress in this area) ; *see also* Kelly Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 **N.C. L. Rev.** 399 (2000) (summarizing the litigation outcomes in every state and evaluating the transformation of the legal theories at play, from an earlier focus on attaining educational "equality" to more recent focus on assuring educational "adequacy").

North Carolina's efforts have not come exclusively in the courts. The General Assembly in 1991 created two additional funds, a Low Wealth Fund and a Small County Fund, to drive supplemental resources to less well-favored districts.

> Since 1991 over $482.1 million has been appropriated, including $99.9 million in 1999-2000. For the 73 low-wealth counties that receive supplemental funding it increased their per pupil expenditures an average of $118 and for the ten lowest spending counties both supplemental fund sources accounted for an additional $333 per student, or 40% of their total current expenditures. Without the low wealth and small county supplemental funding, the current spending gap between the top and bottom spending counties would have swelled to $1,363 per pupil or $35,438 per classroom.

Public School Forum of North Carolina, 2001 Study, *supra* note XXX, at 3.

[230] Ex parte James, 2002 Ala. LEXIS 166 (June 30, 2002) (declining to enter further remedial orders and dismissing school finance lawsuit despite four earlier decisions by the Alabama Supreme Court establishing liability to provide fiscal relief, on the ground that Alabama constitutional principles of separation of powers preclude the judiciary from interfering with state executive and legislative choices about funding public education); Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530 (Ark. 1996) (dismissing an appeal seeking more equitable funding for Arkansas's schools for lack of a final order, but noting that the court could raise the issue of its subject matter jurisdiction to entertain such a lawsuit on a subsequent appeal); Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996) (affirming the dismissal of a challenge to Florida's school finance laws in deference to the legislative role) ; McDaniel v. Thomas, 285 S.E. 2d 156 (Ga. 1981) (dismissing a school finance lawsuit in deference to Georgia's legislative branch); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994) (affirming the dismissal of a challenge to Virginia's system of school finance as not cognizable under the Virginia constitution).

[231] *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 **Yale L.J.** 2043, 2059 (2002) (noting that "the most remarkable feature of school finance litigation is that even successful challenges have not led to equal funding, nor have any of the suits done much to alter the basic structure of school finance schemes").

[232] Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997).

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approaches in the Old North State with many crucial steps yet untaken, while the North Carolina Public School Forum has recently reported that "the spending gap between the state's wealthiest counties and its poorest counties has become an abyss. . . widene[ing] 35.5% since the North Carolina Supreme Court ruled in *Leandro v. North Carolina.*"[233]

Moreover, the most serious state budgetary crisis in over a decade, now sweeping over American statehouses and local counties alike, shows no signs of abating;[234] the current taxation picture present the prospect of long-term fiscal austerity for state educational establishments and hard choices among many pressing state needs.

This is all deeply disconcerting news, of course, since the apparent salvation from the imminent educational disasters forecast by this paper, as we have seen, rested chiefly in steering public resources toward (or alter pedagogical practices on behalf of) those students and schools with the greatest educational need. The new accountability approach promised to accelerate this trend, first, by identifying those who most need help and then, by motivating those who must provide it. In past decades, accountability's supporters reason, an absence of information about the performance of marginalized children has led either to a fool's paradise—in which students, their parents, and even their schools have drifted without full recognition of their students' underperformance—or else an absence of incentives has allowed a cynic's wasteland—in which poor and minority children were abandoned or acculturated to subordination and failure.

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[233] **Public School Forum of North Carolina, 2001 Study**, *supra* note XXX, at 1.

[234] *See* Jessica L. Sandham, *States' Wallets Grow Thinner After Sept. 11*, 21 **Educ. Week** 1, 22-23 (Oct. 31, 2001) (examining the budgetary condition of every state in the fall of 2001, and finding many states facing billion dollar declines in state revenues); (Joetta L. Sack, *Money Woes Hitting Home for Schools*, 21 **Educ. Week** 1 (June 5, 2002) (describing the pressures on local districts from cuts in state funding during the current economic recession).

Ignoring for a moment all of its unexamined assumptions and potential unintended consequences,[235] the most attractive face of school accountability is surely its commitment to the democratic proposition that "all children can learn" and that the nation's public schools must finally be held responsible to deliver on that commitment. Yet two impediments appear to the accomplishment of this great promise. The first is pedagogical, the second, political. The pedagogical challenge is that no scholar or educator has yet identified a package of educational resources or practices that can, in a consistent and replicable manner, reach and lift the performances of those children who most need educational assistance.

This is a controversial statement, for claims are regularly put forward by educational innovators that some new methods have worked/will work to transform children, classrooms, schools, and districts.[236] Indeed, there exist marvelous and encouraging accounts of educational successes in the most straitened circumstances, where principals and teachers appear to have accomplished educational wonders in schools filled with poor and minority children. North Carolinians can also tell such exceptional stories; the trial court on remand in the *Leandro* case pointed specifically to five schools—most in "low wealth" school districts without substantial resources, all enrolling student populations that are over 50% African American, Native American, and/or Hispanic, and all with over 70% of its students eligible for free or reduced priced lunches—in which achievement on North Carolina's EOG tests was outstanding.[237]

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[235] "As a recent National Research Council committee pointed out, it is not yet clear whether the guiding assumptions of standards-based reform are correct or that policies built on them will have their desired effect." **Making Money Matter**, *supra* note XXX, at 113 (summarizing conclusions set forth in **National Research Council, Educating One and All: Students with Disabilities and Standards-Based Reform** 33-46 (L.M. McDonnell, M.J. McLaughlin & P. Morison eds., 1997).

[236] See discussion and authorities cited at note XXX, *supra*.

[237] Hoke County Bd. of Educ. v. State of North Carolina, March 26th Decision, *supra* note XXX, at 60.

Yet very few who have studied public schools carefully have identified any particular combination of strategies with high rates of replicable success. Indeed, Professor Ladd reports the ironic conclusion that "[p]erformance-based reform of education makes sense because so little is known about the specific relationships between educational inputs and outputs. If those relationships were better understood, outcome goals could be achieved by focusing attention on the inputs to the educational process."[238] A number of thoughtful and well-intentioned school reform designs exist, targeted especially at low-income and minority children, including Professor Robert Slavin's 'Success for All' plan,[239] Professor Henry Levin's 'Accelerated Schools' approach,[240] Professor James Comer's 'School Development Program.'[241] Yet, while research suggests that certain school resources have particular power to lift low student performance— specifically the provision of high-quality teachers (with high test scores and/or masters' degrees in their fields) and the reduction of class size—[242]researchers

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[238] Helen F. Ladd, *Introduction*, *supra* note XXX, at 15. *See also* Richard F. Elmore, Charles H. Abelmann, and Susan H. Fuhrman, *The New Accountability in State Education Reform: From Process to Performance*, *in* **Holding Schools Accountable**, *supra* note XXX, at 83 (observing that "[q]uite aside from the resource issue, it is not clear that states have the technical capacity to improve low-performing schools and districts"); David K. Cohen, *Standards-Based School Reform: Policy, Practice, and Performance*, *in* **Holding Schools Accountable**, *supra* note XXX, at 124 (identifying one central problem of accountability systems as "an appreciable lack of professional capacity to respond constructively to serious efforts of any sort to improve instruction. . . especially . . . for the schools in which improvement is most needed—many of which chiefly enroll disadvantaged students"); Eric A. Hanushek, *Comment on Chapters Two, Three and Four*, *in* **Holding Schools Accountable**, *supra* note XXX, at 128 (commenting that both the educational administrative community and the academic community are both "pretty much in the dark about the precise ways to proceed" with accountability models); **Making Money Matter**, *supra* note XXX, at 268 (acknowledging the National Research Council committee's conclusion "that the educational challenges facing urban districts and schools serving concentrations of disadvantaged students are particularly severe. Social science research currently provides few definitive answers about how to improve educational outcomes for these children").

[239] *See generally*, **Robert E. Slavin, Nancy L. Karweit, & Barbara A. Wasik, Preventing Early School Failure: Research, Policy and Practice** (1994)

[240] *See* **Henry Levin, Accelerated Schools for At-Risk Students** (1988).

[241] *See generally*, James P. Comer, *Educating Poor Minority Children*, 259 **Scien. Am.** 42 (1988)

[242] *See* Ronald F. Ferguson & Helen F. Ladd, *How and Why Money Matters: An Analysis of Alabama Schools*, *in* **Holding Schools Accountable**, *supra* note XXX, at 277; William H. Clune, *Comments on Chapters Eight, Nine, and Ten*, *in* **Holding Schools Accountable**, at 362 (suggesting that "skilled teachers

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often acknowledge that "[w]e are not yet certain about how to make schools better or how to deploy resources effectively,"[243] and that "[e]ducational challenges facing districts and schools serving concentrations of disadvantaged students are particularly intense, and social science research provides few definitive answers about how to improve educational outcomes for these youngsters."[244]

This pedagogical uncertainty, in sum, is real and serious. Though it does not counsel against moving forward to address these problems, it does suggest that neither large dollops of good will nor additional fiscal resources, at present, can necessarily assure that "all children *will* learn." That is *especially* true, current research suggests, for lower-income African American, Hispanic, and Native American children who are condemned to learn in concentrated or "high poverty" schools. Although accountability systems can be helpful, even constitutionally indispensable as North Carolina's *Leandro* court has suggested,[245] if educators or legislators impose those strict goals on teachers, and administrators who work in racially and economically isolated schools (or on the students themselves), they ratchet up the potential risks of personal and professional failure to meet new goals, without assuring any dependable way toward achievement of

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and teacher training, extra staff (or time) to reach individual students, and skilled management or coordination" are all important); **Making Money Matter**, *supra* note XXX, at 145 (describing the results of the Tennessee Project STAR controlled experiments, that found student achievement gains from smaller class size, especially for minority students and for students attending inner-city schools).

[243] *Id.* at 161.

[244] *Id.* at 3 (bolding omitted). This volume noted specifically that none of these programs "can yet be said to be firmly established by research" although "many education policy makers are impressed with anecdotal evidence concerning the success of some or all of these programs." *Id.* at 124.

[245] Hoke County Bd. of Educ., Oct. 12, 2000 Decision, *supra* note XXX, at 142 (finding that "[i]f the ABCs program were not in place, a similar accountability program would . . . be required so the State, and the public, could have a statewide accountability system to measure educational progress and . . . measur[e] whether or not each child is receiving the equal opportunity to obtain a sound basic education as the Constitution requires").

those goals.[246] This prospect seems especially pertinent in those Southern states where public schools are rapidly resegregating by race and socioeconomic status, thereby creating just the especially intractable educational challenges that the nation's best educational expert have confessed themselves unable to solve in Northeastern and Midwestern central city school districts.[247]

And that only states the pedagogical challenge. The political challenge is equally formidable. The convoluted history of modern school finance reform has often been told.[248] As indicated above, even in those states where courts have been willing to identify and enforce a right to education, real educational progress has come slowly, for courts have typically looked to state legislative or executive officials to prescribe the specific content of educational reform packages to redress interdistrict fiscal or resource inequities. Yet legislatures both North and South find themselves under very powerful pressure *not* to compromise the reliable political support they receive from white, suburban voters by showering additional aid on failing schools in poor and minority districts with far less electoral clout.[249] Moreover, the amounts that may be required to purchase really promising educational resources for low-performing students—for better-

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[246] "[P]roductive intervention strategies for low-performing schools are a crucial component of a well-designed accountability system. In their absence, a school-based accountability system may become simply a system for assigning blame rather than a system for improving student performance." **Making Money Matter**, *supra* note XXX, at 179-80.

[247] *Id.* at 267-68 (noting that "[o]ne of the greatest challenges is how best to induce a productive use of resources in large urban districts serving disproportionate numbers of disadvantaged students. The productivity problems in these areas differ in some significant ways from those of suburban areas, and there appear to be no easy or simple solutions. . . Social science research currently provides few definitive answers about how to improve educational outcomes for these children.").

[248] *See generally* **Making Money Matter**, *supra* note XXX, at 67-81, 89-112.

[249] *See id.* at 97 (noting that the "effort to raise spending in low-spending districts often require higher state taxes or redistribution of locally raised revenues from wealthier to less-wealthy districts, both of which are highly unpopular among those whose tax burdens would rise or who would see their tax dollars go to educate children in another jurisdictions. Some of this opposition is individual and personal; some stems from more general antitax and antigovernment sentiments. Demographics also play a role. Racial cleavages

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trained teachers, for more teachers per school (hence smaller class size), for tailored programs like Success for All—are huge fractions of the current per-student spending in most states. Professor Clune has estimated that in states where present spending averages $5000, an additional $2000 more per disadvantaged child may be needed for accelerated instruction alone, together with an additional $3000 for "preschool and full-day kindergarten , qualified and adequately trained teachers, social and family services, and building maintenance and construction," for a total of $10,000 per child.[250]

Even states like Connecticut, that have long driven extra dollars to poor and low-performing school districts under progressive, per-child formulas[251] or North Carolina, which has created supplemental funds both for low-wealth school districts and for small districts[252] seem unlikely to agree voluntarily to the level of additional resources that may be required. Moreover, Professor Ryan has cautioned that racial dynamics distort the electoral choices on school finance, and that it is precisely those school finance reform campaigns that appear primarily of benefit to African American and Hispanic children that have, in fact, either succeeded less often in court or, if judicially successful, have experienced significantly greater difficulty in commanding meaningful legislative

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sometimes come into play, as vot4ers see minorities (especially those dwelling in cities) as primary beneficiaries of reform").

[250] Clune, *supra* note XXX, at 359 (citing those figures, but acknowledging other research has suggested that amounts varying from $2000 to $5000 per at-risk child, above regular spending, may be sufficient).

[251] *See* former **Conn. Gen. Stat. Ann** §§ 10-262c-h (West 1986 & 1993 Supp.) (setting forth a state funding formula under which considered not only relative district wealth, but also student educational needs, allowing an extra .25 (beyond a 1.0 for each child) if a child came to school from a poverty-level family and an additional .25 for each child with a performance on statewide achievement tests below a "remedial level").

[252] *See* discussion at note XXX, *supra*

enforcement.[253] Ryan concludes that "the racial makeup of school districts will continue to affect decisions regarding school funding."[254]

Of course, resource disparities in North Carolina and the South more generally, are not presently identical to those that characterize the underfunded, heavily minority urban school districts of the Northeast and Middle West, as we have noted earlier. North Carolina's districts tend to be larger, more racially heterogeneous. Although the five low-wealth school districts that joined as successful plaintiffs in *Leandro* are disproportionately African American, Hispanic, and Native American,[255] the six "high wealth" districts that intervened and also sought additional resources were racially far more typical of North Carolina and atypical of large, central city districts in other regions.[256]

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[253] James E. Ryan, *The Influence of Race in School Finance Reform*, 98 **Mich. L. Rev.** 432, 433 (1999) (contending that "minority school districts—particularly urban minority districts—do not fare as well as white districts in school finance litigation . . . and in the few states where minority districts have successfully challenged school finance schemes, they have encountered legislative recalcitrance that exceed, in both intensity and duration, the legislative resistance that successful white districts have faced"); *see also* Douglas S. Reed, *Twenty-Five Years After* Rodriguez: *School Finance Litigation in the Impact of the New Judicial Federalism*, 32 **Law & Soc'y Rev.** 175 (1998)(reporting results from a survey indicating that white citizens in New Jersey believed school finance reform to have been a policy chiefly benefiting African Americans, and tending to oppose its implementation); Kent L. Tedin, *Self-Interest, symbolic Values, and the Financial Equalization of the Public Schools*, 56 **J. Pol.** 628 (1994) (reporting similar results from a survey in Texas).

[254] *Id.* at 480.

[255] The five are Cumberland (43.0% white, 48.4% African American, 3.4% Hispanic, 1.6% Asian, and 2% Native American); Halifax (6% white, 88.1% African American, 1 % Hispanic, 0.05% Asian, and 5.4 % Native American); Hoke (31.3% white, 49.3% African American, 4.8 % Hispanic, 0.1% Asian, and 13.7% Native American), Robeson (22% white, 31.9 % African American, 2.8 % Hispanic, and 43.1 % Native American); and Vance (30.7% white, 64.6% African American, 4.2 % Hispanic, 0.5% Asian, and 0.15% Native American). *Leandro v. State, supra*, 346 N.C. at 342. *See* **North Carolina Department of Public Instruction, North Carolina Public Schools: Statistical Profile 2001** tbl. 12 *Pupils in Membership by Race and Sex 2000-01*.

[256] The six are Asheville (50.9% white, 44.5% African American, 3.7% Hispanic, 0.6 Asian, and 0.1% Native American); Buncombe (88.9 % white, 7.3% African American, 2.7% Hispanic, 0.7% Asian, and 0.4% Native American); Durham (32.9% white, 58.6% African American, 6.0% Hispanic, 2.3% Asian, and 0.3% Native American); Forsyth (54.1% white, 37.9% African American, 6.6% Hispanic, 1% Asian, and 0.3 % Native American); Mecklenburg (46.6% white; 43.1% African American, 5.5% Hispanic, 4.4% Asian, and 0.5% Native American); and Wake (62.9% white; 28.3% African American, 4.6% Hispanic, 3.9% Asian, and 0.4% Native American).

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Yet the struggles within Southern state legislatures, and within the South's larger school districts, are real, and because of the growing racial segregation, pose the danger of becoming increasingly racialized—especially if and insofar as increasing segregation of North Carolina schools, and gaps in student achievement under the state and federal accountability goals, begin increasing to pose the issue of additional resources in racial terms.

IV.

CONCLUSION

Public educators live amid policy controversies as perpetual and potentially dangerous as late season hurricanes. Yet those who navigate the currents of public education must assess when impending challenges pose risks too great to run, and take prudent action to minimize or avoid those risks. This paper has contended that the impending racial resegregation of North Carolina's public schools could combine catastrophically with the school accountability movement (especially as it takes on the new federal requirements imposed by the No Child Left Behind Act) to accelerate the intradistrict flight of white and middle-class parents from schools that may become as racially and economically isolated as academic Bermuda Triangles, to be avoided at all costs by better teachers and administrators, and by well-informed, economically advantaged parents.

It seems all but inevitable that if North Carolina's public schools do substantially resegregate, many of its majority black and Hispanic schools will become perennially "low-performing," that their students' race and poverty status will become further viewed, both by those students and by their white peers, as predictive of school failure,

and that that huge percentages of students in these majority black, Hispanic, and Native American schools will either be retained in grade, leading to a spiraling downward cycle of school difficulties and demoralization.

The most obvious shelter from these dire consequences lies in a reversal of the Fourth Circuit's pernicious and misguided jurisprudence, which would allow well-intentioned school boards forthrightly to continue the school assignment policies of the past thirty years that, despite their many deficiencies, have worked such measurable progress for the South and its children of all races. Reversal of those decisions, however, will come only with a change in the court's composition, which seems highly unlikely in the near future, or from the Supreme Court, a prospect not inconceivable, but by no means a certainty. For educational policy makers and lawyers outside the Fourth Circuit, however, a concerted legal effort to quarantine this socially destructive doctrine should be an immediate legal priority.

Within North Carolina and the Fourth Circuit, the model of school assignment that Wake County has chosen to pursue would, if adhered to over time, avoid much of the educational damage which this paper has forecast, since it would actively resist the demographic trends toward "high poverty" and "low-performing" schools that set up the sorting behavior by alert white and middle-class parents that can send a school's demography spiraling toward long-term failure. Yet the capacity of the Wake school board itself to sustain broad public support for these enlightened policies will be seriously tested in the coming few years, and other school districts may not find leaders with foresight to follow Wake's lead. Controlled choice plans such as those adopted by Winston-Salem/Forsyth and Charlotte school systems, by contrast—however attractive to

their district's white political majorities—have already demonstrated their strong tendency to slip into irrecoverable levels of racial polarization.

The judicial commitment exhibited in *Leandro/Hoke County* to meet the educational needs of every child is salutary (although it has been rejected as a paradigm by other Southern states such as Alabama, Florida, Georgia), and perhaps it will diminish the worst features of the developing system. Yet it is being challenged vigorously by the State on appeal, and even if it is affirmed by the North Carolina Supreme Court, it must await the active cooperation of the legislative and executive branches. Even if that cooperation flows freely, the evidentiary weight of scores of careful and unbiased studies—from James Coleman's work in the mid-1960s to the present—teaches that no discrete quantum of resources, separated delivered to racially and economically isolated public schools, can easily restore the cumulative educational injuries worked by their isolation. It was a just such an insight that Chief Justice Earl Warren brought to the nation in *Brown*. Fifty years later, it is a lesson not only Southerners, but all Americans, need to relearn, for the sake of our children and our democratic future.

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